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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF OKLAHOMA, and
KENNETH A. ELLISON,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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December, 1958.

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No. .....

In the
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JURISDICTIONAL STATEMENT

a. OPINIONS OF COURT BELOW

(i) The final opinion of the Supreme Court of Oklahoma, in this cause, is officially reported in 327 P.2d 699. It also is appended hereto as Appendix A. (In this connection, it should be noted that the Syllabi, prepared by the Court, are the official decisions of that Court—not the body of the opinion. See *Corbin* v. *Wilkinson*, 175 Okla. 247, 52 P.2d 45.)

(ii) The first opinion of the Oklahoma Supreme Court was not officially reported. It appears, unofficially in 27

Okla. Bar Journal, pages 636 *et seq.*, and is appended hereto as Appendix B-1.

(iii) The first opinion was supplemented and modified, without modification of Syllabi, on rehearing. This opinion also was not officially reported. It appears, unofficially, in 27 Okla. Bar Journal, page 917, and is appended hereto as Appendix B-2.

b. GROUNDS OF JURISDICTION

(i) Nature of the proceeding.

This is an appeal from a decision of the Supreme Court of Oklahoma, the highest court of said State in which a decision could be had, in a civil action instituted therein for a judicial review of an administrative order of the Corporation Commission of Oklahoma, entered under the provisions of Title 52, Oklahoma Statutes 1951, Sec. 87.1 (d), as construed, interpreted and sought to be enforced by said administrative board.

The administrative order of which judicial review was sought had commanded the Appellant, despite his objections, to elect between two alternatives and, if such election be not made within a fixed time, establishing a presumption of an election for him. The two alternatives enjoined upon the Appellant by the administrative board were either (1) to agree to become a mining co-partner in a speculative mining venture of another, entailing the involuntary assumption of an obligation to pay at least $55,000.00 into such venture, together with a proportionate part of any additional costs incurred by the speculator

and together with liability for any potential misfeasances, nonfeasances or malfeasances of the speculator, or (2) to agree to sell a 7/8ths interest in vested mineral interests, owned by the Appellant, to the speculator at a price, fixed by the administrative board, of approximately $11,700.00. The astounding basis assigned by the administrative board for making such an order was that the Appellant and the speculator both were owners of mineral rights in a "common source of supply", previously legally established, that the speculator desired to drill a well costing an *estimated* $270,000.00 to $300,000.00, that the Appellant "being an oil producer and being a man of substantial means" and "the owner of a greater interest * * * than the operator" should be required to aid the latter in his venture in the manner above stated as "it would be unfair *to the operator* of the unit to be required to carry the burden of W. E. Anderson's proportionate share of the 7/8th leasehold production and at the same time take all of the risks of *drilling a non-producing well, or a well that did not produce sufficient oil to pay the cost of drilling and completing the same.*"

In the action filed in the Supreme Court of Oklahoma, seeking judicial review of the above described administrative order, Appellant assigned two grounds: (1) That the statute, under which the administrative board purported to act, did not authorize such an order, and (2) if the statute be so interpreted and construed as to authorize such administrative action, then the statute is repugnant (a) to the Constitution of the State of Oklahoma and (b) to the Constitution of the United States, Amendment XIV.

Section 1, in particulars clearly specified and hereafter discussed.

The final decision of the Oklahoma Supreme Court effectively removed all non-Federal questions. It construed and interpreted the State statute to authorize the making of the administrative order above described and the decision of the State court was in favor of the validity of said statute, as so construed, interpreted and sought to be enforced against the Appellant, *expressly* rejecting the contentions of Appellant that the same is repugnant to the Constitution of the United States.

(ii) Dates of judgment and appeal.

The last opinion of the Oklahoma Supreme Court containing the final Syllabi adopted by the court, was entered on February 26, 1957. The decision, however, did not become final by Oklahoma practice (See *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498, 567) until denial of the Petition for Rehearing on July 2, 1958.

Notice of Appeal to this Court was filed in the Supreme Court of Oklahoma on September 26, 1958 (86 days). Time for docketing of this appeal was enlarged on November 14, 1958 (49 days after filing of Notice of Appeal), by order of the Chief Justice of the Oklahoma Supreme Court, to 20 days from November 25, 1958 (*i.e.* December 15, 1958).

(iii) Statutory jurisdiction of this Court.

The jurisdiction of this Court on appeal is conferred by 28 U.S.C., Sec. 1257(2). The Supreme Court of Oklahoma, the highest court of said State in which a decision may be had, in a civil action where there is drawn in question the validity of a statute of the State of Oklahoma on the ground of its being repugnant to the Constitution of the United States, has rendered a decision in favor of the validity of said statute. Said grounds of repugnancy of said State statute to the Constitution of the United States were expressly urged in the lower court, the decision thereon was necessary to a determination of said action, and said decision expressly was made the basis of its determination by the lower court.

(iv) Cases sustaining jurisdiction on appeal.

Appellant submits the following cases to sustain the jurisdiction of this Court to entertain and determine this appeal:

Atchison T. & S. F. R. Co. v. *Public Utilities Comm.*, 346 U.S. 346; *Kedroff* v. *St. Nicholas Cathedral, etc.*, 344 U.S. 94; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179; *Winters* v. *New York*, 333 U.S. 507; *Alt* R. Co. v. *Illinois Commerce Comm.*, 305 U.S. 548; *Malinsky* v. *New York*, 324 U.S. 416, 417.

(v) The statute involved.

The statute of the State of Oklahoma, validity of which is drawn in question in this action, is Title 52, Oklahoma Statutes 1951, Sec. 87.1(d).

Although validity of subsections (a), (b) and (c) of said Sec. 87.1 is not drawn in question, the provisions of the entire of said Sec. 87.1 are pertinent to a determination of the questions involved. Since the provisions of the section are quite lengthy, the text of Section 87.1, *supra,* is appended hereto as Appendix C.

c. QUESTIONS PRESENTED BY THE APPEAL

(The questions hereafter stated do *not* relate to the mere *enforcement* of the statute in a manner repugnant to the Constitution of the United States. The State Supreme Court, in its decision on the non-Federal issues of construction of the State statute, expressly held that *the statute authorized* the administrative order made by the Oklahoma Corporation Commission. Therefore, the questions presented by this appeal, and hereafter stated, are directed to *the validity of the statute itself,* as it is interpreted, construed and actually sought to be enforced against the Appellant.)

FIRST. WHETHER a State statute, which seeks to authorize a governmental administrative agency to compel a joint owner of property against his will to become a mining co-partner of another in a speculative venture, involving liability to contribute approximately $55,000.00 to the enterprise of the speculator and additional undetermined potential liability for further expenditures as well as for possible misfeasances, nonfeasances or malfeasances of the speculator, is repugnant to the Constitution of the United States, Amendment XIV, Section 1, in that such statute, as sought to be enforced against the Appellant in

a manner consonant with its said provisions, is an attempt by a State to deprive a person of his *liberty to refrain from contracting* in relation to private property without due process of law?

SECOND. WHETHER a State statute such as described in the First Question, is repugnant to the Constitution of the United States, Amendment XIV, Section 1, in that such statute, as sought to be enforced against the Appellant in a manner consonant with its said provisions, is an attempt by a State to deprive a person of his *property* (money and liability enforceable against property) without due process of law?

THIRD. WHETHER a State statute, which seeks to authorize a governmental administrative agency to compel a person against his will to convey his private property to another private person for a consideration fixed by administrative action, is repugnant to the Constitution of the United States, Amendment XIV, Section 1, in that such statute, as sought to be enforced against the Appellant in a manner consonant with its said provisions, is an attempt by a State to deprive a person of his *liberty to refrain from contracting* to sell his private property without due process of law?

FOURTH. WHETHER a State statute such as described in the Third Question, is repugnant to the Constitution of the United States, Amendment XIV, Section 1, in that such statute, as sought to be enforced against the Appellant in a manner consonant with its said provisions,

is an attempt by a State to deprive a person of his *property* without due process of law?

FIFTH. WHETHER a State statute, seeking to authorize a governmental administrative agency to impose upon a person a sanction for the latter's refusal to acquiesce in a State's attempted deprivation of him of his property or liberty of contract without due process of law, which sanction is itself an attempt by the State to deprive him of his liberty of contract or property in another manner, is repugnant to the Constitution of the United States, Amendment XIV, Section 1, in that such statute, as sought to be enforced against the Appellant in a manner consonant with its said provisions, is an attempt by a State to deprive a person of his liberty or property without due process of law? (In other words, does the offering of an enforced choice of alternatives relieve the statute of repugnancy?)

SIXTH. WHETHER those portions of a State statute which seek to authorize a governmental administrative agency to extend its otherwise valid regulation of the production of natural mineral resources to the further field of compelling private persons involuntarily to participate in or aid speculative exploratory operations by ordering such private persons, because they are deemed to have "substantial means" and happen elsewhere to be engaged in producing minerals, to contribute money and their financial responsibility to the proposed speculative exploratory enterprise of another private person, or to sell valuable property rights to the latter at a price fixed by administrative action, are repugnant to the Constitution

of the United States, Amendment XIV, Section 1, in that such portions of the statute constitute an unwarranted attempt to expand the police power of the State and as such are an attempt by a State to deprive persons of liberty and property without due process of law?

d. STATEMENT OF MATERIAL FACTS

This controversy had its inception in an administrative proceeding before the Corporation Commission of Oklahoma. It reached its judicial stage when the Appellant filed, in the Supreme Court of Oklahoma, a petition for a judicial review of the administrative order of the Corporation Commission. (See: *Chicago, R.I.&P.R. Co.* v. *Stude*, 346 U.S. 574, *reh. den.* 347 U.S. 924; *Croxton* v. *State*, 186 Okla. 249, 97 P.2d 11; *Carter Oil Co.* v. *State*, 205 Okla. 541, 240 P.2d 787.)

Approximately two years prior to the institution of the administrative proceedings out of which this cause arose, pursuant to subsections (a) and (b) of Section 87.1 *supra* (Appendix C), the Corporation Commission had found that "a common source of supply" of oil and gas existed and *underlay* a specified area; and the Commission ordered that there be established "drilling and spacing units" to consist of those portions of the "common source of supply" which underlay 80-acre tracts of the surface, measured as described in the order.

This order also prescribed that only one well might be drilled in each unit; and it directed that "in the event there are divided or undivided interests within any unit", and the owners should be unable to agree on a plan for

development, the Commission would resolve their differences as provided by the statute.

The validity of that order is not questioned by this controversy. The questions presented here arise as a sequel to that order.

As a result of that order, the mineral rights of many owners and lessees became distributed among "units" underlaying 80-acre tracts as described in the order instead of being integrated properties. Such was the situation as to the instant "unit."

Appellant Anderson owned full unleased mineral rights under approximately 157 acres which overlay the "common source of supply"; and Appellee Ellison was the mineral lessee of acreage in addition to that portion which happened to fall within the boundaries of the instant 80 acres. However, the instant 80-acre unit, bounded as described in the Commission order, resulted in Appellant owning unleased mineral rights under 18.48 per cent of the surface overlaying the unit, and Ellison being the mineral lessee of mineral rights under 12.6 per cent of the surface overlaying the unit. (In explanation of the apparently strained language above, it must be remembered that the "unit" is a portion of a *subsurface* structure, described by using boundaries of the surface overlaying the subsurface structure.) The remainder of the "unit" was owned by others, their identity and *quantum* of interest being immaterial here.

With the above situation existing, Ellison instituted proceedings in the Corporation Commission, pursuant to

subsecton (d) of Section 87.1 *supra* (Appendix C), stating that he desired to drill a well on the unit, and asserting that he was "the owner of a majority of the Lessees' interests in said unit"—a statement which was false, by Ellison's own testimony at the administrative hearing and so found by the Commission, but which is only remotely material to the questions here presented. He further stated that he had "made arrangements"—the nature of which were not disclosed in the administrative proceeding—"with all of the other owners of lessees' interests except W. E. Anderson", for Ellison to drill a well on the unit at a cost stated by Ellison to be $270,000.00. He prayed, in general terms, that the Commission make "an order fixing the rights of all parties in respect to sharing the production and the cost of obtaining such production * * * and prescribing such other terms and conditions as * * * may appear just, equitable and necessary."

Appellant Anderson responded, stating that he did not desire to participate actively in the drilling of the proposed well; but that if Ellison wished to drill a well into the unit, Anderson was agreeable to allowing Ellison reimbursement, out of 7/8ths (the customary lessee's portion) of Anderson's share of any production obtained from the unit, for that portion of Ellison's expenditures which should correspond to Anderson's *aliquot* part of the unit.

A hearing was held before a Trial Examiner for the Commission, at the conclusion of which hearing the Examiner made his Report to the Commission. That Report injected into the proceedings, for the first time, the considerations upon which the present Federal questions are

founded. For, after recommending approval of Ellison to be the "operator", the Trial Examiner made the remarkable recommendation that Anderson, *because of his substantial means and of his production elsewhere of oil,* should be required to contribute 18.48 per cent of the cost of a well to be drilled by Ellison—the cost of which was tentatively, but not definitely, fixed at "$270,000.00 to $300,000.00"—or to "take a bonus" of $800.00 per acre "to be paid as mineral compensation in lieu of the right to participate in the working interest in said well."

To that Report, the Appellant promptly filed Exceptions (Tr. R. 63-66), asserting that the above described recommendations would, among other legally objectionable consequences, "result in the taking of property in violation of the Federal Constitution"; and that, in basing the recommendation on Anderson's means, the Examiner had advocated "that there should be two standards of orders of the Corporation Commission, one for persons of little or no means and one for persons of some means, which is contrary to law and American sense of justice."

Following argument of the Exceptions before the Corporation Commission, that body rendered its Findings and Order.

Insofar as is material here, the Commission "found" (a) that it previously had established units of which the instant unit was one, (b) that Ellison "is the owner of oil and gas leasehold estate on *12.6 per cent* of the mineral interests in said unit and the said W. E. Anderson *is the owner of 18.48 per cent of the mineral interests in said unit* which are unleased", (c) that Ellison desires to drill

a well on the unit and asks that the leasehold interests in the unit be pooled and that he be permitted to drill and operate the well, (d) that Anderson does not desire to participate in the active drilling of a well in the unit, (e)

> "That the said W. E. Anderson being an oil producer and being a man of substantial means should be required to either pay his proportionate part of the cost of drilling and completing said well, or furnish satisfactory evidence for the payment thereof or he should be required to take a bonus in lieu of his right to participate in said well; he *is the owner of a greater interest in said well* than the operator and it would be unfair to the operator of this unit to be required to carry the burden of W. E. Anderson's proportionate share of the 7/8ths leasehold production and at the same time *take all of the risk of drilling a non-producing well, or a well that did not produce sufficient oil to pay the cost of drilling and completing the same*",

(f) that the cost of drilling and completing the well would be "$270,000.00 to $300,000.00" but the Commission would retain jurisdiction to redetermine such cost, and (g) "that in the interest of *encouraging development* in the area, *securing the greatest ultimate recovery of oil* from the pool, preventing waste and protecting correlative rights", the order should be entered as above set forth. (Emphasis in above quotations is supplied.)

The Order entered upon these "Findings", in the portions material here, directed that Ellison be authorized to drill the well desired by him, that Anderson "be and he hereby is authorized and permitted to participate in working interest in said well by paying his proportionate share of the cost", that in the event Anderson does not desire to

participate in said well, he should have "the option of taking a *lease bonus* of $800.00 per acre *for the acreage owned by him*", that "Anderson shall have thirty (30) days from the date of this Order within which to make an election as to which alternative he desires to accept, and that in the event he does not make such election, it will be presumed that he has elected to take the said $800.00 per acre bonus *for the acreage owned by him underlying said tract*", and that if Anderson elected to participate in the working interest and any dispute should arise over cost of drilling and equipping the well, the Commission reserved jurisdiction to determine the said costs.

Since there is no definite statutory authority in Oklahoma for appealing of any "pooling" orders of the Corporation Commission to the State Supreme Court, but since said Court had entertained jurisdiction in other cases seeking judicial review of this phase of the regulatory jurisdiction of the Commission, Appellant instituted an original action in the Supreme Court of Oklahoma, praying reversal of the above mentioned order of the Commission and that said Commission be prohibited and restrained from seeking to enforce said order.

The grounds of said action, as set forth in the petition were three: 1st, that the statute [Sec. 87.1(d) *supra*] did not authorize any such order as was made by the Commission; 2nd, if the statute should be construed as authorizing such action, then the statute was repugnant to both the Constitution of Oklahoma and the Constitution of the United States; and 3rd, that the ruling of the Commission was arbitrary, unreasonable and capricious. This latter

ground was not urged by the Appellant in the briefs and argument to the Supreme Court, it being deemed included in the contention that any statute seeking to authorize an order such as was made in this controversy, on the grounds assigned by the Commission, would itself be unconstitutional.

The specific grounds of invalidity of the statute, based upon the assertion of repugnancy to the Federal Constitution, were set forth in the petition filed in the Supreme Court of Oklahoma, as follows (Tr. R. 11-12):

> "The aforesaid statutes of the State of Oklahoma, as construed and applied by the said Corporation Commission, are in contravention of the Constitution of the United States in the following particulars:
>
> (a) The same seek to abridge the privileges and immunities of the plaintiff as a citizen of the United States, contrary to the provisions of Amendment XIV, Section 1, which prohibits the deprivation of this plaintiff of his property and liberty without due process of law, to-wit: (1) The taking of the private property of one person, without the owner's consent, for the private use of another; (2) The impairment of the liberty of a person to refrain from contracting to engage in a speculative enterprise; (3) The impairment of the liberty of a person to refrain from selling his property at a price not negotiated by him; and (4) The compelling of a person to accept compensation for property taken from him in an amount fixed by a tribunal other than in the manner provided by law for citizens of the State of Oklahoma."

That the Supreme Court of Oklahoma entertained the action is shown by the opinions appended hereto, deciding the issues on their merits.

In its first decision, (Appendix B-1) by the Syllabi (the authoritative portion of the ruling), the Oklahoma Supreme Court eliminated the non-Federal issue of interpretation of the statutory provisions and, likewise, construed in concise form the import of the Commission order. The two Syllabi material here are:

> "1. By the provisions of 52 O.S. 1951, sec. 87.1, the Corporation Commission is authorized to fix the proportionate part of the cost of drilling and completing an oil and gas well to be paid by an *owner of an undivided part interest* in the leasehold estate *in a drilling unit* and order such owner *to elect to pay* the same or to accept a fixed sum per acre *as a bonus for a lease* and to further order that, if the election is not made within a fixed time, it be presumed that he has elected to take the bonus *for a lease* (Emphasis supplied).
>
> "2. Section 87.1 of Title 52 O.S. 1951, is not in conflict with the State or Federal Constitutions guaranteeing that private property shall not be taken for private use nor without due process of law" (Tr. R. 77).

The judgment of the Supreme Court of Oklahoma, immediately following the Syllabi, is important to the legal questions here raised in that the terms of the judgment itself, as well as the emphasized portions of the above quoted Syllabi, cannot be reconciled with the discussion contained in the opinion (which latter, as heretofore noted, is *not* the authoritative decision of the Court under Okla-

homa practice). The judgment proper is as follows (Appendix B-1):

> "W. E. Anderson, as plaintiff, filed this proceeding against the Corporation Commission of the State of Oklahoma and Kenneth A. Ellison, as defendants, appealing from an order of said Commission, granting Ellison a permit to drill an oil well on a well-spacing unit and granting Anderson the option of *paying his share of the cost* of the well and *participating in the working interest or 7/8ths of the production* therefrom or of accepting a fixed amount per acre *for a lease* on his interest *in said drilling unit*. Order of Commission affirmed" (Emphasis supplied).

Following rendition of that decision, Appellant filed a Petition for Rehearing (Tr. R. 93-94) assigning, among other grounds (a) that the practical effect of the opinion is to abandon "conservation" as the primary objective of the exercise of the police power in petroleum regulatory legislation, substituting a new objective which inherently is incompatible with restriction of production, and (b) that if the wording of the statute should be extended by inference to authorize the entry of the order made by the Commission "then such construction and interpretation necessarily renders the statute in contravention of Section 1, of the Fourteenth Amendment to the Federal Constitution."

In explanation of the "Supplemental Opinion on Rehearing" (Appendix B-2), resulting in a modification of the Commission order (Tr. R. 96-97), counsel for Appellant were somewhat piqued by what they considered "judicial legislation" in the expansion of the plain wording of the

statute and of the somewhat cavalier rejection of what they deemed fundamentally unanswerable arguments in their brief and argument, both of which results appeared to be more in support of preconceived notions of how the case should be decided than the result of judicial reasoning. Hence, in the Petition for Rehearing and the brief in support thereof, counsel had pointed out to the court that, in the only prior appeal involving a similar sort of order, the court had reversed the order on the stated ground that the Commission was "*without jurisdiction*" to order a participation payment by a unit interest owner unless he also be given the optional right to make a bond in lieu of payment or to require bond for faithful expenditure, by the operator, of money advanced to him. (This had been included in the Exceptions to the Report of the Trial Examiner—#9, Tr. R. 64—and ignored by the Commission in its Order.)

Faced with this embarrassing declaration as to "jurisdiction", rendering a decision in favor of Ellison and against Anderson logically untenable, the prevailing portion of the Oklahoma Supreme Court were obliged to accede—with obvious ill-grace as demonstrated by the terms of the Supplemental Opinion (Appendix B-2)—to a judgment modifying the Commission order in accordance with such established limitations on Commission jurisdicton.

Appellee Ellison strenuously objected to Anderson's being allowed these basic protections in the event of an election by him to participate in the speculative venture. In a Petition for Rehearing filed by Ellison, a new argument

was advanced that the order did not require Anderson *to pay* Ellison any money but merely to contract to pay it.

Seizing on that pretext to avoid the force of the prior holding, the author of the prior opinion modified the "reasoning" of his former opinion (unauthoritative as heretofore shown) and, with the concurrence of three other Justices in the new opinion, together with that of a fourth Justice (who apparently disagreed with the opinion but thought that some prior decision — undesignated — had brought into operation the rule of "*stare decisis*"), was able to muster a bare majority of the court to reinstate the decision and judgment rendered in the first opinion. It should be noted that the last decision and judgment (Appendix A) are identical with those of the first opinion above quoted: (1) that *the statute authorized* the Commission to order "*an owner of an undivided part interest in the leasehold estate in a drilling unit*" *to pay* his proportionate part of the cost of drilling and completing an oil and gas well or to accept a fixed sum "*as a bonus for a lease*", and further to order that, if the election be not made within a fixed time, it be presumed that he has elected to take the bonus "*for a lease*"; and (2) that said statute, so providing, is not in conflict with the Federal Constitution guaranteeing that private property shall not be taken for private use nor without due process of law.

Although the decision of the Oklahoma court did not discuss the contentions of the Appellant, quoted *supra*, that the statute also sought to impair his liberty to refrain from contracting either to become a mining co-partner with another or to refrain from entering into a lease contract

with another at a price not negotiated by himself, the unavoidable result of the decision was to deny those contentions along with those expressly mentioned.

Appellant filed a timely Petition for Rehearing, directed at this last action of the court, again urging (Tr. R. 120-121) the Federal questions advanced in his first Petition for Rehearing. Fifteen months later, by memorandum order and without discussion, that Petition for Rehearing was denied (Tr. R. 123).

The enforcement of the decision of the Oklahoma Supreme Court has been stayed pending appeal by its Order (Tr. R. 132-133) by reason of the filing of approved Supersedeas Bond.

e. SUBSTANTIALITY OF FEDERAL QUESTIONS FOR APPEAL

1. Nature of case as within statutory authorization for review on appeal and precedents supporting review on appeal.

The statute upon which Appellant relies for bringing this appeal [28 U.S.C., Sec. 1257 (2)] gives express authorization for review by this Court, on *appeal,* of a final judgment rendered by the highest court of a State in which a decision could be had, where is drawn in question the validity of a State statute on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

All of the requisite factors are present in this case to bring it within the terms of that statute. Although review well might have been sought upon the grounds of arbi-

trary or unreasonable action of the Oklahoma Corporation Commission—since the record reeks with such biased preferential application of governmental coercion—the decision of the Oklahoma Supreme Court to the effect that the Oklahoma *statute authorizes* the action of the Corporation Commission places the Federal questions upon a basis of validity of the statute rather than upon its method of enforcement. Moreover, the validity of the statute need not be tested "by what may be done under it", but by what was done under it; the questions presented are not abstract ones.

Before proceeding to an analysis of the Federal questions above presented, in their relation to the State statute, the issues should be narrowed to those upon which Appellant is seeking appellate review.

The questions presented by Appellant did not and do not involve the validity of "pooling" regulations by a State in furtherance of the proper and laudable policy of "conservation." Appellant, at no time in the proceedings, has challenged the propriety or legality of the establishment of the drilling unit in which he—as stated by the Oklahoma Supreme Court in its decision (Syllabus 1, Appendix A)—is the "owner of an undivided part interest." Neither has Appellant asserted the invalidity of any provision of the statute (Appendix C) which would be reasonably referable to the objective of "conservation"—*i.e.* the prevention of waste of a natural resource of the State—including the "protection of correlative rights" threatened with infringement as a result of such *restrictive* regulations.

The broad thesis upon which Appellant rests his position is twofold: *First*, that those *portions of the provision* of the State statute which seek to authorize the action taken by the Corporation Commission in this controversy are an experiment in a new field of governmental regulation, *compulsory aid to speculative exploration*, rather than for "conservation" and the prevention of waste; and *Second*, that those *portions of the provisions* of the State statute which seek to authorize the administrative actions here taken are not reasonably adapted to any legitimate public purpose, therefore depriving the Appellant of his liberty and property without due process of law.

The first portion of this broad thesis is inherent in the Sixth Question above presented; and although it affects the other five Questions also, a conclusion of the constitutional impropriety of the express statutory authorizations treated in those questions also could be reached by consideration in the light of "conservation" itself.

That the Federal questions actually *were presented* to the Oklahoma court is clear in the quotation, *supra*, from the petition filed in that court, seeking judicial review of the administrative action (Tr. R. 11-12). And that the decision of the Oklahoma court necessarily rested upon the ground that the statute as construed by the Oklahoma Supreme Court was valid, as against Appellant's claims of repugnancy to the Federal Constitution, likewise is clear from the second Syllabus of the decision, also quoted *supra* (Appendix A).

So, from the standpoint of assertion of the statute's repugnancy to the Constitution of the United States and

of the decision of the highest State court of the validity of the statute as against such assertions, the cardinal requirements for appellate review are clearly demonstrated from the Record.

In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra* (340 U.S. 179), which also involved an order of the Oklahoma Corporation Commission which the Oklahoma Supreme Court had upheld as against contentions that it, as a legislative act, contravened the Fourteenth Amendment to the Federal Constitution, this Court expressly decided that its jurisdiction on appeal properly was invoked to review the decision of the Oklahoma court. Even the suggestion of MR. JUSTICE BLACK that the appeal should be dismissed, was based upon his conception that the Federal questions were "frivolous", rather than upon any procedural or statutory deficiency.

In *Kedroff* v. *St. Nicholas Cathedral, etc., supra* (344 U.S. 94), this Court also declared that it would determine the constitutional issues on their merits where a State court had sustained the validity of a State statute, as construed by it, as against a claim of repugnancy to the Federal Constitution.

And in *Atchison, T. & S. F. R. Co.* v. *Public Utility Comm., supra* (346 U.S. 346), this Court declared that where an appellant presented squarely to the State court the contention that a State statute took property without due process of law, and the State court upheld the statute as construed by it, the proper method for review of the State court's decision is by appeal.

Moreover, in *Alton R. Co.* v. *Illinois Commerce Comm., supra* (305 U.S. 548), the precedent was further established, in relation to substantiality of the Federal questions asserted, that if they are not so lacking in merit that they can be disposed of merely by citation of former decisions, the questions should require consideration on appeal.

Both the substantiality of the independent legal questions and of the economic impact of the State court decision will be treated hereafter. Also, it will be shown that this case is one involving Federal questions "of first impression"—that no prior judicial decision has determined the precise questions here presented. However, from the standpont of the *prima facie* elements of statutory appellate jurisdiction—the State statute, the timely assertion by Appellant of its repugnancy to the Federal Constitution and the decision of the highest court of the State in favor of its validity, all appear in the Record on this appeal.

2. Legal and economic substantiality of the Federal Questions presented.

It must not be overlooked, in considering the provisions of the Oklahoma statute, that the Oklahoma court has declared that "the provisions of 52 O.S. 1951, Sec. 87.1"—whether literally or by "construction" is now unimportant—authorizes the specific order made by the Corporation Commission. Such statutory authorization, therefore, includes the power of the Commission—

(a) to compel the Appellant to become a mining co-partner with another in a speculative exploration venture involving "the risk of drilling a non-

producing well, or a well that did not produce sufficient oil to pay the cost of drilling and completing the same"—a partnership that would require the payment by Appellant of at least $55,000.00 of cash and the lending of his financial responsibility to answer for possible misfeasances, nonfeasances or malfeasances of the operating partner,

or

(b) to take a 7/8ths interest in Appellant's vested ownership of "an undivided part interest in a drilling unit", and give it to another private person (or, if a lease be considered as a contract, to compel Appellant to enter into a contract leasing 7/8ths of his part interest in a drilling unit), all on terms fixed by administrative action,

because Appellant is "a man of substantial means" and an oil producer, *"in the interest of encouraging development"* of oil or gas.

In consideration of the foregoing, let us first examine the asserted warrant for the governmental actions, the encouraging of development. Although the Commission's order (Tr. R. 74) also stated that it was made for "preventing waste and protecting correlative rights", these latter assertions may be ignored as merely "decorative." The injunctions imposed upon the Appellant, by no stretch of imagination can have any rational application to prevention of any waste or to *protection of any right*.

Prior to any action which could be authorized under subsection (d) of Sec. 87.1 *supra*, all immediate aims of conservation had been accomplished. When the "common source of (potential) supply" had been delineated two years earlier, drilling units therein established, and the number and location of allowable wells specified, any potentially wasteful production of natural resources had been forestalled.

The same order had resulted in the establishment of undivided *co-ownership of mineral rights in the unit*. This was not a correlative right in any *production* of the minerals, for no production from the unit had been had. Until there should be production, and conflicting claims should arise as to sharing it, the future correlative rights of the several undivided interest owners of a unit to such production required no protection.

The *only* correlative rights in existence, at the time of inception of the instant administrative proceeding, were the right of each co-owner of an interest in the unit to speculate by drilling a well, matched by the correlative right of each other interest owner *not* to gamble his money on the possibility of profitable production.

The protection of the first of these correlative rights was the subject of the controversy in *Superior Oil Company* v. *Corporation Commission*, 206 Okla. 213, 242 P.2d 454, (cited, by the author of the opinion in this case, as "almost identical to that in the case at bar"). For there, two co-owners each desired to exercise their right to drill the single allowable well, and it became incumbent upon the Commission to "protect" this correlative right of each

interest owner as against the impact of the prohibition against more than one well. Such, obviously, was not the case here. Appellant offered no objection to Ellison exercising his right to gamble his money in quest of profit; and, since Appellant was not seeking to exercise his correlative right to drill, it required no protection by the Commission.

The only possibility of the existence of any other correlative rights, therefore, would require an entirely novel exercise of the police power—the *destruction* of the pre-existing right of a co-owner to remain in passive ownership of a mineral interest, and the creation of a *new* right by governmental fiat, the right of a cotenant (to use a term of common understanding without necessarily giving it any legal implications at this time) to require another unwillingly to engage in the former's entirely voluntary speculation or to forfeit to him a substantial part of the property of the latter.

Since such a "right", if it should be created, inevitably would involve the *antithesis to a restriction* of production of minerals, and only could be in implementation of *enlarging production*, the legal existence of such a right, or the propriety of the exertion of governmental force to attain the only objective upon which it possibly could be founded, requires an inquiry into wholly new fields of governmental regulation.

As was stated in *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 80, "this Court has many time warned that one person's property may not be taken for the benefit of another private person without a justifying public pur-

pose, even though compensation be paid." And there is no reason why this same principle should not be applied equally to a compulsion to contract, a deprivation of one's liberty.

In *Henderson Co.* v. *Thompson*, 12 F. Supp. 519, where the Court was considering whether or not allegations of denial of due process, directed at alleged "conservation" regulations, constituted a Federal question which would confer injunctive jurisdiction on a Federal court, it was pointed out that the decisions sustaining production regulations always had "hinged on conservation and prevention of waste"; that if the regulation did not relate to these, it constituted an unreasonable interference with private rights.

It is conceded, by the Appellant, that a State may regulate the exploration for oil or gas as a legitimate instrumentality for protection of public safety or other salutary *public* purpose not necessarily included in the scope of the term "conservation." (*Keaton* v. *Oklahoma City*, 187 Okla. 593, 102 P.2d 938, *cert. den.*, 311 U.S. 616.) And Appellant recognizes the force of the statement in MR. JUSTICE BRANDIES' dissent in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, that "the conception of a public utility is not static."

But, if there be any remnant of constitutional restraint upon legislative (or judicical construction of legislative) invasion of formerly accepted private rights of property and private liberty, each new attempt at extension of governmental regulative power should receive careful examination at the hands of the tribunal vested, by the Fed-

eral Constitution, with guardianship of the heritage of American citizens.

It is not the function of this Jurisdictional Statement to *resolve* the questions raised in this appeal. Such questions of fundamental freedom and private property rights properly require plenary consideration upon their merits.

This extension of drilling regulation, under the police power of the state, from the fields of public safety and from the prevention of waste of natural resources, to the compulsory participation in exploration for minerals, presents as novel and substantial Federal questions as were involved in *Munn* v. *Illinois*, 94 U.S. 113, where it was necessary to determine whether property, formerly considered essentially private, had become "clothed with a public interest" of sufficient moment to sustain governmental interference. And these questions require consideration equal to that accorded another Oklahoma "experiment in interference with private enterprise" when the doctrine of *Munn* v. *Illinois*, *supra*, was sought to be extended to the manufacture of ice. [*New State Ice Co.* v. *Liebmann*, *supra* (285 U.S. 262).]

Of course, should the Sixth Question be resolved in a manner incompatible with this attempted extension of the police power, resolution of the other five Questions would be unnecessary. But, should the Sixth Question tentatively be answered in the negative, there still would remain the questions of constitutional propriety inherent in the other five.

The first two of the other Questions are founded upon the inescapable import of the initial alternative enjoined

upon the Appellant. It already has been stated that this portion of the order commanded him to become a mining co-partner of Ellison.

Under Oklahoma law, as well as at common law, the election by Appellant of "paying his share of the cost of the well and participating in the working interest" (see judgment portion of the decision of the lower court, Appendix A), would have made Appellant a mining co-partner with Ellison. (*McKay* v. *Kelly*, 130 Okla. 162, 264 Pac. 814; *Earp* v. *Mid-Continent Pet. Corp.*, 167 Okla. 86, 27 P.2d 885; *Taylor* v. *Brindley* [C.A.], 164 F.2d 235.)

Not only would he have been required to pay the very considerable sum of $55,000.00 into a speculative venture in which he did not wish to participate, but his "substantial means" would have been subject to payment of all expenses incurred by Ellison, the operator, in the event Ellison did not pay his own share of the costs. And even more onerous would be the subjection of Appellant's "substantial means" to liability for any potential misfeasances, nonfeasances or malfeasances of Ellison in his operation (*Helmerich & Payne* v. *American Nat. Bank*, 195 Okla. 318, 157 P.2d 168).

Illustrative of this latter potentiality, an actual example—which may be treated as purely hyothetical—might be given. In another "operation" by Ellison, an explosion occurred, resulting in the death of several persons. Such a happening in this operation, had Appellant complied with that injunction of the Commision and had negligence of Ellison been established by the survivors of the deceased, easily might have removed Appellant from both classifi-

cations in which the Commission placed him. He well may have ceased to be a man of *any* means and to have become an involuntary *ex-producer* of oil.

The FIRST, THIRD and FIFTH Questions presented in this appeal include, as an integral part of their premises, a fundamental tenet of American constitutional law. This tenet is that freedom to contract includes the correlative freedom *to refrain from contracting.* (See *Federal Trade Comm.* v. *Raymond Bros.-Clark Co.*, 263 U.S. 565, 573.)

So in the FIFTH Question is squarely presented the issue that, entirely beside the point that the first alternative of the Commission order (authorized by the statute, the State court said) effectively would deprive the Appellant of $55,000.00—and potentially more of his property —if it be considered in the light of offering Appellant a voluntary choice, which he was afforded the option to refuse, it must be noted that the choice was a limited one only. For, the only alternative offered him was *another* compulsory contract, the leasing of 7/8ths of his valuable mineral interest in the unit to Ellison at a price fixed by the Commission (incidentally, a price actually fixed by Ellison in *his* testimony, a price he would not accept for *his* interest, and a price substantially below that fixed by an impartial qualified witness—Tr. R. 72, 47, 73).

In other words, the only "options" offered to Appellant both were attempts to compel him to contract against his own volition.

The ultimate practical effect of the latter alternative in the Commission's order, was a governmental *taking* of

a leasehold interest in Appellant's property and the giving of that interest to Ellison, a private person. This *taking* could not be camouflaged in any vestments of a public use; it was too patently for Ellison's private use, either to enable him to utilize it in securing some other partner to assist in the financing of his speculative venture or to enhance his possible financial gain in case the venture resulted in profitable production.

Viewed from the practical result of either alternative offered to Appellant—and he was afforded no escape from one or the other, the "choice" being made for him if he refrained from selecting one or the other—the Commission's order, made under judicially declared authority of the statute, was nothing less than the taking of Appellant's property for a *private* use. That such a taking is a deprivation of property without due process of law is well established by ample precedent. (See: *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 80; *Easter* v. *Dundalk Holding Co.*, 199 Md. 303, 86 A.2d 404; *General Petroleum Co.* v. *Hobson*, 23 F.2d 349; *Missouri Pac. R. Co.* v. *Nebraska*, 164 U.S. 417; *Madisonville Traction Co.* v. *St. Bernard Min. Co.*, 196 U.S. 239; *Chicago & E. R. Co.* v. *Keith*, 67 Ohio St. 279, 65 N.E. 1020; Cooley, Const. Lim., 8th Ed. pp. 1124-1129.)

The author of the opinion sought to escape this obvious constitutional defect in the statute, as construed by him, by seeking to ignore Appellant's vested *property interest in the unit* and in any production that might be taken therefrom. In attempting to avoid a "deprivation of property", he propounded the theory that Ellison was the owner

of the *well* and that Appellant was being *given merely a privilege* to participate in Ellison's well upon compliance with one of the alternatives offered by the Commission order.

The sophistry of that argument lies in the statement of the order itself. If Appellant is being offered an opportunity merely to participate in Ellison's well, then why should he be coerced into leasing 7/8ths of his interest to Ellison in the event he chose not to become Ellison's partner in the drilling venture? And, additionally, why should he be left with a 1/8th royalty interest in the production?

Even if that attempted evasion of a substantial Federal question were an authoritative portion of the decision of the State court, the jurisdiction of this Court to examine the true state of affairs, to ascertain whether a Federal right were being denied, has been asserted as a necessary corollary to its appellate function. (See *Ward* v. *Board of Comm'rs of Love County*, 253 U.S. 17.)

However, as already has been pointed out, the arguments of the author of the opinion are *not* the decision of the Court. The Court *held* that Appellant was the "owner of an undivided part interest in the unit", and that the latter alternative offered Appellant was "accepting a fixed amount per acre for a lease on his interest in the drilling unit."

That authoritative portion of the decision was entirely in accord with prior decisions as to the nature of the rights in a drilling unit. (See *Wood Oil Co.* v. *Corporation Commission*, 205 Okla. 537, 239 P.2d 1023; *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U.S. 376, 378, 379.)

When the drilling unit was created—in this instance, two years prior to Ellison's urge to drill it—all of the mineral owners whose mineral rights came within its boundaries automatically became entitled to a portion of any production derived from the unit.

In other words, and in accepted legal parlance, the interest owners became tenants in common in the unit, *i.e.*, a unity of possession but separate and distinct titles. See: *Earp* v. *Mid-Continent Pet. Corp., supra* (167 Okla. 86, 27 P.2d 885); *Prairie O. & G. Co.* v. *Allen,* 2 F.2d 566; *Taylor* v. *Brindley, supra* (164 F.2d 235).

This common law relationship has been an incident of property at least since the statute of 4 Anne, c. 16; and it is a property right that cannot be divested or impaired except as an incident to a legitimate public need. (See *Louis K. Liggett Co.* v. *Baldridge,* 278 U.S. 105, 113.) And the "due process of law" for protecting the correlative rights of cotenants, in relation to improvements which one desires to make and another does not, has been established by long tradition, also.

That "due process of law" recognizes the right of one cotenant to improve the property, giving him a lien upon the other's share of the profits until the non-participating cotenant's share of the cost of the improvement is recovered by the active cotenant. (See *Prairie O. & G. Co.* v. *Allen, supra.*)

Such traditional "due process", established by generations of masters of the science of justice, does not consider it unfair to a minority cotenant to deny him the

right to compel a larger interest owner to participate actively in a speculative improvement which the minority cotenant is not obliged to make, but merely unilaterally desires. Such "due process" considers the unfairness of compelling a majority cotenant involuntarily to participate actively in an improvement desired only by a minority interest owner.

Conceding that even such long established incidents of ownership of property are subject to modification by the police power of the sovereign, whether or not there exists a *sound public purpose* to warrant modification of that established right of property, and whether or not the regulation here authorized by the statute, as exemplified in the Commission order, is reasonably adapted to the sound public objective sought to be attained, both are substantial Federal questions which properly should receive plenary consideration by this Court. (*Sterling* v. *Constantin*, 287 U.S. 378, 397.)

3. The Federal Questions here presented have not been previously decided.

The discussion heretofore should have demonstrated that the questions here presented differ materially from those decided in such cases as *Hunter Co.* v. *McHugh*, 320 U.S. 222, and the other "conservation" cases where the police regulation was founded on the prevention of waste of natural resources and was reasonably adapted to the attainment of that objective.

Here we are confronted with questions relating to an entirely new exercise of the police power. If it be

sought to justify them on the grounds of "conservation", the inquiry necessarily need be made as to whether these new forms of regulation have any reasonable tendency to prevent waste. Or, if it be conceded—as is apparent from its very nature—that the Corporation Commission order, conformable to the new established statutory authority, has no possible tendency to prevent waste, but is designed to promote speculative exploration and increased production (to be prorated if and when obtained), two additional novel questions are presented: First, is such an aim a legitimate objective for the police power, and Second, are the means chosen proper ones for attaining such an objective when they involve such radical subordination of established concepts of decency, fairness and justice? (See *Malinsky* v. *New York*, 324 U.S. 416, 417.)

The only other line of authorities which might mistakenly appear to be analagous are the so-called "municipal zoning" cases. And, a careful analysis of those decisions will demonstrate that they, also, treat an entirely different facet of the police power than here is involved, and that the zoning orders sustained in those decisions, although superficially similar to the Commission's order here, actually are entirely different in legal effect.

The zoning regulations to which reference is being made are those of the nature treated in such cases as *Amis* v. *Bryan Pet. Corp.*, 185 Okla. 206, 90 P.2d 936, and *Phillips Pet. Co.* v. *Davis*, 194 Okla. 84, 147 P.2d 135, both cited by the author of the opinion (Appendix A), and *Thompson* v. *Johnson-Kemnitz Drilling Co.*, 193 Okla. 507, 145 P.2d 422.

The situation arose out of the fact that the city of Oklahoma City, being faced with pressure for the drilling of oil wells within the city limits, had invoked its police power to "zone" areas for drilling, to the exclusion of other areas. The regulations so instituted also included one prohibiting the drilling of more than one well in each city block (of designated area) and provided (a) that a majority of the lot owners of a block should be issued the permit for the drilling of the well, but (b) such permit should not be granted unless the minority lot-owners were paid a bonus and royalties in compensation for denying them the right to drill on *their* lots or unless the minority lot-owners be permitted to participate in the drilling venture on a basis proportionate to the lot areas involved.

The writer of the opinion (and probably the Justice who concurred on the ground of "*stare decisis*") obviously fell into the erroneous belief that such a regulation and the instant order of the Corporation Commission were identical in *legal effect* due to the similarity of the practical choices offered.

In the two decisions cited *supra*, the Court had held that the minority lot-owners did not become tenants in common with the majority owners, that the rights of the minority lot-owners were entirely creations of the ordinance—a privilege and not a property right—and therefore could not insist upon rights depending upon a status of cotenancy.

In order to comprehend the true legal import of this holding, one must look to the basis of the police power when exercised in a zoning regulation. This, specifically,

is the regulation of the *use* of property, largely for the protection of the safety and general welfare of the public. For instance, in *Gant* v. *Oklahoma City*, 160 Okla. 62, 15 P.2d 833 (*aff'd* 289 U.S. 98), *Anderson-Kerr* v. *Van Meter*, 162 Okla. 176, 19 P.2d 1068, and *Beveridge* v. *Harper-Turner Oil Trust*, 168 Okla. 609, 35 P.2d 435, that *basis* for the police power regulations of a municipality, in respect of oil drilling, was definitely emphasized.

However, In *Indian Terr. I. O. Co.* v. *Larkins*, 168 Okla. 69, 31 P.2d 608, *Van Meter* v. *Westgate Oil Co.*, 168 Okla. 200, 32 P.2d 719, and *Beveridge* v. *Westgate Oil Co.*, 185 Okla. 206, 90 P.2d 936, the distinction between the exercise of the police power of a municipality in a zoning regulation and the exercise of the police power of the state in conservation regulations was clearly made.

As was said in the *Larkins* case, *supra*:

> "The authority of the city officials to interfere with the right of Mr. Larkins was limited to the proper exercise of the police power of the city. That power operated when necessary to protect the health, morals, safety and general welfare of the public * * * It does not include the power to prevent waste of natural resources. * * * The Legislature did not confer authority on cities to prevent the commission of waste of natural resources or to prevent the inequitable taking of oil from a common source of supply. Such authority was delegated by other statutory provisions to another tribunal. The question of improper production and inequitable draining of contiguous lands is not a determining factor in an application for a permit to drill under the terms of the statute and ordinance."

In the words of the same Court in *Phillips Pet. Co.* v. *Davis, supra* (194 Okla. 84, 147 P.2d 135), the whole zoning regulation "proceeding is for the purpose of determining whether a permit to drill should be granted, not to determine questions of title."

The gist of these decisions, under careful scrutiny and analysis, is this: (a) That a city has the power to prohibit entirely the use of property in the city for drilling for oil; (b) That it may permit such use by one property owner and prohibit such use by the adjoining property owner if such preference will implement the objectives of the regulation; (c) That it may impose, *as a condition for the issuance of a permit* to one property owner, the requirement that he indemnify his neighbor who is denied a like use of his property because of public policy or, likewise *as a condition for the issue of the preferential permit* it may require the preferred property owner to permit his neighbor to participate in the single drilling venture permitted by the city; (d) That such conditions on issuance of a permit for an otherwise prohibited use are not an attempt, by the city, to "pool" mineral rights of separate property owners or to combine separate property rights into a cotenancy, but are merely conditions imposed upon one property owner as the "price" of the preferential treatment which is denied his neighbor; (e) That, hence, the minority lot-owner is merely the beneficiary of a *privilege* which the city need not have granted him, and not an attempted creation of a cotenancy with the permittee.

Viewed from this standpoint, the zoning decisions cited by the author of the opinion are both logical and supported by precedent. But if considered as similar examples of the police power exerted in "pooling" regulations, they lose all legal foundation.

Contrasted with the situation in the regulations under the municipal zoning power, the "pooling" regulations *did* create a cotenancy in a presumed subsurface "common source of supply." In assuming a "common source of supply", the "law of capture", otherwise appertaining in Oklahoma, necessarily was abrogated. (See: *Wilcox Oil & Gas Co.* v. *Bond*, 173 Okla. 348, 48 P.2d 820; *Spiers* v. *Magnolia Pet. Co.*, 206 Okla. 510, 244 P.2d 852; and *Palmer Oil Co.* v. *Phillips Pet. Co.*, 204 Okla. 543, 231 P.2d 997.) The very recognition of the existence of a "common source of supply" brought into existence a cognizable property right of each person owning an interest therein. And that property right has been recognized in the cases last cited *supra* as well as in *Wood Oil Co.* v. *Corporation Commission, supra* (205 Okla. 537, 239 P.2d 1023), *Patterson* v. *Stanolind O. & G. Co. supra* (305 U.S. 376, 378, 379), and the State Court decision in the latter case, 182 Okla. 155, 77 P.2d 83.

Therefore, it may be seen that the Federal constitutional questions affecting the deprivation of a property right vested by virtue of pooling regulations are essentially different from those affecting a mere privilege granted to one person under the zoning regulation of another's *use* of his property.

4. Summary.

Recapitulating the foregoing, it should be apparent that the Questions presented by this appeal—

FIRST. Involve an entirely novel experiment in exercise of the police power of the State—the imposition of regulations designed to compel participation in speculative exploration for minerals;

SECOND. Present a radical departure from approved justification for state regulation of mineral rights and for governmental interference with normal incidents of property ownership and of liberty of contract;

THIRD. Involve the abrogation of traditional property rights including the freedom from governmental taking of private property for the private use of another;

FOURTH. Pose the inquiry of whether the police power may be invoked to compel a person to enter into a contract, against his will, to participate in an admitted speculation of another private person; and

FIFTH. Squarely put before this Court whether the fact that because a man has substantial means and is the owner of oil production is a justification for governmental compulsion, coercing him to engage involuntarily in speculation by another—speculation which potentially could financially exhaust his resources—or forfeit valuable property to the speculator at a fraction of its value, without the benefits of the traditional safeguards accorded by due process in the case of the even more important taking of property for a *public* use.

All of these things, the Oklahoma Supreme Court has said, are authorized by the statute under consideration.

It would appear that such fundamentals of fairness, justice, due process and constitutional guarantees, coupled

with the not unsubstantial economic factors involved, should warrant, at the very least, the plenary consideration of this Court after briefing and argument on the merits.

Respectfully submitted,

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LEON S. HIRSH,
Oklahoma Natural Building,
Oklahoma City 2, Oklahoma,

Attorneys for Appellant.

December, 1958.

APPENDIX

APPENDIX A

FILED
IN SUPREME COURT
OF OKLAHOMA
Feb 26, 1957
ANDY PAYNE, CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

W. E. ANDERSON,

Plaintiff,

vs

No. 36,969

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and KENNETH A. ELLISON,

Defendants.

SYLLABUS

1. By the provisions of 52 O. S. 1951, sec. 87.1, the Corporation Commission is authorized to fix the proportionate part of the cost of drilling and completing an oil and gas well to be paid by an owner of an undivided part interest in the leasehold estate in a drilling unit and order such owner to elect to pay the same or to accept a fixed sum per acre as a bonus for a lease and to further order that, if the election is not made within a fixed time, it be presumed that he has elected to take the bonus for a lease.

2. Section 87.1 of Tit. 52 O. S. 1951, is not in conflict with the State or Federal Constitutions guaranteeing that private property shall not be taken for private use nor without due process of law.

[APPENDIX]

3. A statute authorizing the Corporation Commission to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among owners of the leasehold interest of the oil and gas underlying their land, and to fairly distribute among them, the costs of production and of the apportionment is a proper exercise of the police power and does not violate the provisions of the State or Federal Constitutions.

APPEAL FROM THE CORPORATION COMMISSION OF THE STATE OF OKLA. W. E. ANDERSON, AS PLAINTIFF, FILED THIS PROCEEDING AGAINST THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND KENNETH A. ELLISON, AS DEFENDANTS, APPEALING FROM AN ORDER OF SAID COMMISSION, GRANTING ELLISON A PERMIT TO DRILL AN OIL WELL ON A WELL SPACING UNIT AND GRANTING ANDERSON THE OPTION OF PAYING HIS SHARE OF THE COST OF THE WELL AND PARTICIPATING IN THE WORKING INTEREST OR 7/8 OF THE PRODUCTION THEREFROM OR OF ACCEPTING A FIXED AMOUNT PER ACRE FOR A LEASE ON HIS INTEREST IN SAID DRILLING UNIT.

ORDER OF COMMISSION AFFIRMED

Bohanon & Barefoot,
Oklahoma City, Oklahoma — Attorneys for Plaintiff,

Rinehart & Rinehart,
El Reno, Oklahoma, — Attorneys for Plaintiff.

Leon S. Hirsh,
Oklahoma City, Oklahoma — Attorney for Plaintiff.

Robinson, Shipp, Robertson
& Barnes, Ralph Boggess, — Attorneys for K. A. Ellison,

Floyd Green, Oklahoma City,
Oklahoma, — Attorney for Corporation Commission.

DAVISON, J:

This is a proceeding in this court, instituted by W. E. Anderson, as plaintiff, against the Corporation Commission of Oklahoma and Kenneth A. Ellison, as defendants, on appeal from an order of said Commission, authorizing the drilling of an oil well on an eighty acre tract of land in McClain County, Oklahoma, and directing the terms of participation in the production therefrom.

Anderson was the owner of 36.96% of the fee in a forty acre tract of land. Ellison was the owner of 25.2% of the leasehold estate in the adjoining forty acres. The two tracts had been by prior order of the Commission, designated as a single drilling or spacing unit in which the parties' respective percentage interests were one half that in the individual forties as above set out. On May 11, 1955, on application of Ellison, the Commission made an order finding the percentage ownership of said unit and that all other owners except Anderson had agreed with Ellison on a plan of development of the unit. Ellison was authorized to drill a well, the cost of completing the same being near $300,000.00. Anderson was authorized to participate in the working or lessee interest by paying to Ellison his proportionate share of the drilling and completion costs of the well. The Commission further found that $800.00 per acre was the reasonable bonus value of the leasehold and ordered that Anderson have the option of electing to participate in the working interest in the well or to accept from Ellison $300.00 per acre bonus for a lease on his undivided interest. It was further ordered that, if Anderson had not made an election within thirty days thereafter, he would be presumed to have "elected to take the said $800.00 per acre bonus for the acreage owned by him underlying said tract." It is from that order that this appeal has been perfected.

[APPENDIX]

Anderson's attack upon the order is founded upon the assertion that, by reason of the pooling and unitization order, a co-tenancy relationship was created between himself and Ellison; that the order appealed from was in violation of the rights of co-tenants and outside the authority conferred by the statute—52 O. S. 1951, sec. 87.1; that, if said statute authorized the order, it violates the provisions of the State and Federal Constitutions in that it amounted to a taking of private property for private use and without due process of law; that, if said statute authorized that order, it is further unconstitutional in that it compels citizens to contract against their wills and it also impairs vested contractual rights; and lastly, that the Corporation Commission could not exercise such judicial powers except by a due process of law wherein a litigant is entitled to a trial by jury.

Petroleum and petroleum products have, in less than two generations, became most vital in life and industry over the entire world. They have, by reason thereof, become probably the most important of natural resources. It was only natural that, with the increase in importance and use, the necessity for conservation was recognized. To curtail over-production and waste for the benefit and protection of the general public, restraints had to be placed around the individual's rights to develop and produce beyond the demand or need. The only logical method of restraint, other than limitation of production per well, was the curtailment of drilling by exercise of the police power. There evolved the well spacing laws. But, with well spacing alone, the object of curtailment was met, although often at the expense of serious inequalities and inequities between the various mineral owners and lessees. Under such primary restraints, when Ellison drilled a well on the forty acres in which he owned an interest, Anderson would have no rights whatever therein, his ownership being of an interest in an adjoining forty acres. Thus, con-

sideration of the correlative rights of such owners and lessees became a necessary part of the legislation. The results were the acts authorizing unitization and pooling in each common source of supply in order that the exercise of the police power in the conservation of natural resources would not effect too serious an unbalancing of correlative rights. The act under consideration, 52 O. S. 1951, sec. 87.1, authorized the order complained of as a necessary and integral part of securing those various rights. In that connection, we are here dealing with rights of the owners of what is commonly called the "working interest." No issue is presented as to the other one eighth or "royalty interest."

By order, Ellison, who had made agreements with all other owners of interests in the minerals underlying the eighty acre drilling unit for development of the same, was granted a permit to drill a well on the forty acres in which he owned an interest but in which Anderson owned none. By the same order, Anderson was granted the privilege of participating in the production from that well if he met the requirements. He could pay his proportionate part of the drilling and completion costs of the well and receive his portion of the seven eighths working interest of the production or he could accept $300.00 per acre as a bonus therefor and share only in the royalty interest.

We need not consider the reasonableness of the order since Anderson's contention goes solely to the authority of the Commission to make it. His argument is that, because the former order made him and Ellison co-tenants in the eighty acres, the only method by which Ellison could recover, under the rules of law applicable to such a relationship, Anderson's proportionate part of the cost was by deducting it from the production, if the well proved to be good. However, with so many interdependent rights and burdens to be established it is not a simple proposition of determining the existence of co-tenancy. In the case of

Amis v. *Bryan Pet. Corp.*, 185 Okl. 206, 90 P. 2d 936, an almost identical relationship existed by reason of municipal zoning ordinances controlling drilling. It was there said that,

> "Here the city created the relationship as it now exists between the parties. Had it not been for the zoning ordinance none of the lot owners would have held an interest in the oil and gas rights beneath the lots of the others. The relationship in the nature of a tenancy in common resulted merely as an incident to the application of the city's police powers. The tenancy is entirely subject thereto. The parties cannot successfully assert their common law rights as tenants in common, for such a tenancy actually does not exist."

Expanding that statement, in another case dealing with municipal ordinances, it was said in the case of *Phillips Pet. Co.* v. *Davis*, 194 Okl. 84, 147 P. 2d 135 that,

> "The rights of non-leasing owners of lots are entirely the creations of the ordinance. The purpose and intent of the ordinance is to require lot owners to bear his proportionate share of the expense in order to participate in the production. If the owner leases his lot, he is thereby relieved from paying his part of the expenses. It is the intent of the ordinance that he pay or secure payment of his part of the expense in order to share in the whole production. In equity he ought not to be permitted to stand by and see the operator take all the chances of failure and come in and pay or offer to pay only after the venture has proved successful"

The limitation of co-tenancy rights and privileges of some of the mineral owners is no greater burden on them than is the limitation of the rights and privileges of capture of the operating mineral owners. In the case at bar,

Anderson had no more justification for complaint of being required to elect whether to pay his portion of the costs or accept the fixed bonus for a lease, than Ellison had to complain of being required to share with him the object of his capture—the production from the well. Both were prerequisites to other rights and privileges granted by the same order under authority of the same statute.

This court has, on several occasions, held that unitization and pooling statutes were constitutional, where the question was raised by the producer. Such was the situation in one of the first cases to be here presented on the subject—*Patterson* v. *Stanolind Oil and Gas Co.*, 182 Okl. 155, 77 P. 2d 83. Following and citing the *Patterson* case was that of *Croxton* v. *State*, 186 Okl. 249, 97 P. 2d 11. Cited and discussed in those two cases, are a majority of the opinions of various other courts, both state and federal, on the subject. Quoted in both was the following excerpt from the case of *Lombardo* v. *City of Dallas*, 124 Tex. 1, 73 S.W. 2d 475, to-wit:

> "All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law."

That statement is applicable to the case at bar. The order complained of did not constitute a taking of property of Anderson in any manner. It granted him the right to participate in the production from a well on Ellison's property, but on condition that certain requirements were met. The limitation of one well to eighty acres was a proper exercise of the police power in furtherance of conservation of

natural resources. That he was allowed to share in the production or to receive a bonus instead of that participation was a grant to him at the expense of Ellison merely because of the recognition of correlative rights. On the other hand, Ellison was not deprived of anything because he was granted the right to drill the only well which would be permitted on the eighty acre drilling unit upon condition that Anderson (and other owners of leasehold interests) could participate in the production upon payment of his part of the cost. Both were forced to co-operate for the benefit of both and for the protection of the public generally.

The Supreme Court of the United States, in the case of *Hunter Co.* v. *McHugh*, 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 5, made the following statement, supporting it with citation of numerous earlier cases;

> "A state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment."

Citing and quoting the last above mentioned opinion, this court held similar orders valid and the statutes authorizing them to be a valid exercise of the police power, in the case of *Wood Oil Co.* v. *Corporation Commission*, 205 Okl. 537, 239 P. 2d 1023. To the same general effect were the cases of *Spiers* v. *Magnolia Pet. Co.*, 206 Okl. 510, 244 P. 2d 852, and *Palmer Oil Corp.* v. *Phillips Pet. Co.*, 204 Okl. 543, 231 P. 2d 997.

A situation almost identical to that in the case at bar was presented in the case of *Superior Oil Co.* v. *Corporation Commission*, 206 Okl. 213, 242 P. 2d 454. Therein, the appeal attacked the reasonableness of the order rather than the constitutionality of the statute. However, the parties did

present the question as to whether or not the order itself violated constitutional guaranties and it was upon that ground that three of the justices dissented. The opinion of the court was in harmony with the quoted rule in the *Hunter Co.* case, *supra*. For the same reasons, the order herein and the statute, authorizing it were not invasions of the rights of Anderson, as guaranteed by the State and Federal Constitutions.

As pointed out in the above discussion, the order of the Commission did not deprive Anderson of any property rights. He was granted the right to participate in oil produced from another's well upon compliance with fixed requirements. Therefore he was not entitled to have a jury trial. This situation was in addition to the proposition that the order was regulatory and in the exercise of the police power. By such exercise, the State may do away with a cause of action and, the right to jury trial being incidental thereto, is thereafter no longer involved. *Adams* v. *Iten Biscuit Co.*, 63 Okl. 52, 162 Pac. 938. That case cites and quotes the case of *State* v. *Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, wherein many of the early cases are collected which discuss the proposition that the police power may be exercised without resort to judicial proceedings. The last two above cases dealt with the Workmen's Compensation Acts but the rules of law are the same.

It has been ardently argued by plaintiff Anderson that the order of the Commission from which this appeal has been filed "is unreasonable and unjust and is in excess of the authority vested in the Commission" because of "not providing in the alternative the right of the non-driller to give bond as security for said sum" in view of the holding in the *Superior Oil Co.* case, *supra*. That part of that opinion is, however, not here applicable because of the difference in the Commission's order there and the order herein. The order in the *Superior Oil Co.* case provided:

"That in the event the respondent Superior Oil Company has not *paid* to the applicant herein *its proportionate share of the cost* of the drilling and completion of said well within said 10 day period then it shall be assumed that the respondent Superior Oil Company has elected to accept the sum of $500.00 per acre for its lease in said unit * * *." (Italics added)

The order in the instant case provided:

"That the said W. E. Anderson shall have thirty (30) days from the date of this order within which *to make an election* as to which alternative he desires to accept, and that in the event he does not *make such* election, it will then be presumed that he has elected to take the said $800.00 per acre bonus for the acreage owned by him underlying said tract." (Italics added)

Thus, it is readily seen that the only thing Anderson was required to do by reason of said order was to elect whether he would participate in the drilling and operation of the well or would sell his leasehold rights. In the *Superior Oil Co.* case, the non-driller was required to make payment within a fixed time if he desired to participate. The making of a bond is the alternative to making payment and, until payment is required, the alternative need not be granted.

For the reasons stated, the order of the Corporation Commission appealed from is affirmed.

HALLEY, JOHNSON & JACKSON, JJ: CONCUR.
WILLIAMS, J., CONCURS BY REASON OF STARE DECISIS

WELCH, C.J., BLACKBIRD & CARLILE, JJ: DISSENT.

APPENDIX B-1

FILED
IN SUPREME COURT
OF OKLAHOMA
Mar 27, 1956
ANDY PAYNE, CLERK.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

W. E. ANDERSON,

Plaintiff,

vs

No. 36,969

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and KENNETH A. ELLISON,

Defendants,

SYLLABUS

1. By the provisions of 52 O. S. 1951, sec. 87.1, the Corporation Commission is authorized to fix the proportionate part of the cost of drilling and completing an oil and gas well to be paid by an owner of an undivided part interest in the leasehold estate in a drilling unit and order such owner to elect to pay the same or to accept a fixed sum per acre as a bonus for a lease and to further order that, if the election is not made within a fixed time, it be presumed that he has elected to take the bonus for a lease.

2. Section 87.1 of Title 52 O. S. 1951, is not in conflict with the State or Federal Constitutions guaranteeing that private property shall not be taken for private use nor without due process of law.

3. A statute authorizing the Corporation Commission to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among owners of the leasehold interest of the oil and gas underlying their land, and to fairly distribute among them, the costs of

production and of the apportionment is a proper exercise of the police power and does not violate the provisions of the State or Federal Constitutions.

APPEAL FROM THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

W. E. Anderson, as Plaintiff, filed this proceeding against the Corporation Commission of the State of Oklahoma and Kenneth A. Ellison, as defendants, appealing from an order of said Commission, granting Ellison a permit to drill an oil well on a well spacing unit and granting Anderson the option of paying his share of the cost of the well and participating in the working interest or 7/8 of the production therefrom or of accepting a fixed amount per acre for a lease on his interest in said drilling unit.

ORDER OF COMMISSION AFFIRMED

Bohanon & Barefoot,
Oklahoma City, Oklahoma,
Attorneys for Plaintiff.

Rinehart & Rinehart,
El Reno, Oklahoma,
Attorneys for Plaintiff.

Leon S. Hirsh,
Oklahoma City, Oklahoma,
Attorney for Plaintiff.

Robinson, Shipp, Robertson,
& Barnes, Ralph Bogess,
Attorneys for K. A. Ellison,

Floyd Green, Oklahoma City, Okla.
Attorney for Corporation Commission.

DAVISON, J:

This is a proceeding in this court, instituted by W. E. Anderson, as plaintiff, against the Corporation Commis-

sion of Oklahoma and Kenneth A. Ellison, as defendants, on appeal from an order of said Commission, authorizing the drilling of an oil well on an eighty acre tract of land in McClain County, Oklahoma, and directing the terms of participation in the production therefrom.

Anderson was the owner of 36.96% of the fee in a forty acre tract of land. Ellison was the owner of 25.2% of the leasehold estate in the adjoining forty acres. The two tracts had been by prior order of the Commission, designated as a single drilling or spacing unit in which the parties' respective percentage interests were one half that in the individual forties as above set out. On May 11, 1955, on application of Ellison, the Commission made an order finding the percentage ownership of said unit and that all other owners except Anderson had agreed with Ellison on a plan of development of the unit. Ellison was authorized to drill a well, the cost of completing the same being near $300,000.00. Anderson was authorized to participate in the working or lessee interest by paying to Ellison his proportionate share of the drilling and completion costs of the well. The Commission further found that $800.00 per acre was the reasonable bonus value of the leasehold and ordered that Anderson have the option of electing to participate in the working interest in the well or to accept from Ellison $800.00 per acre bonus for a lease on his undivided interest. It was further ordered that, if Anderson had not made an election within thirty days thereafter, he would be presumed to have "elected to take the said $800.00 per acre bonus for the acreage owned by him underlying said tract." It is from that order that this appeal has been perfected.

Anderson's attack upon the order is founded upon the assertion that, by reason of the pooling and unitization order, a co-tenancy relationship was created between him and Ellison; that the order appealed from was in violation of the rights of co-tenants and outside the authority con-

ferred by the statute—52 O. S. 1951, sec. 87.1; that, if said statute authorized the order, it violates the provisions of the State and Federal Constitutions in that it amounted to a taking of private property for private use and without due process of law; that, if said statute authorized that order, it is further unconstitutional in that it compels citizens to contract against their wills and it also impairs vested contractual rights; and lastly, that the Corporation Commission could not exercise such judicial powers except by a due process of law wherein a litigant is entitled to a trial by jury.

Petroleum and petroleum products have, in less than two generations, become most vital in life and industry over the entire world. They have, by reason thereof, become probably the most important of natural resources. It was only natural that, with the increase in importance and use, the necessity for conservation was recognized. To curtail over-production and waste for the benefit and protection of the general public, restraints had to be placed around the individual's rights to develop and produce beyond the demand or need. The only logical method of restraint, other than limitation of production per well, was the curtailment of drilling by exercise of the police power. There evolved the well spacing laws. But, with well spacing alone, the object of curtailment was met, although often at the expense of serious inequalities and inequities between the various mineral owners and lessees. Under such primary restraints, when Ellison drilled a well on the forty acres in which he owned an interest, Anderson would have had no rights whatever therein, his ownership being of an interest in an adjoining forty acres. Thus, consideration of the correlative rights of such owners and lessees became a necessary part of the legislation. The results were the acts authorizing unitization and pooling in each common source of supply in order that the exercise of the police power in the conservation of natural resources would

not effect too serious an unbalancing of correlative rights. The act under consideration, 52 O.S. 1951, sec. 87.1, authorized the order complained of as a necessary and integral part of securing those various rights. In that connection, we are here dealing with rights of the owners of what is commonly called the "working interest." No issue is presented as to the other one eighth or "royalty interest."

By the order, Ellison, who had made agreements with all other owners of interests in the minerals underlying the eighty acre drilling unit for development of the same, was granted a permit to drill a well on the forty acres in which he owned an interest but in which Anderson owned none. By the same order, Anderson was granted the privilege of participating in the production from that well if he met the requirements. He could pay his proportionate part of the drilling and completion costs of the well and receive his portion of the seven eights working interest of the production or he could accept $800.00 per acre as a bonus therefor and share only in the royalty interest.

We need not consider the reasonableness of the order since Anderson's contention goes solely to the authority of the Commission to make it. His argument is that, because the former order made him and Ellison Cotenants in the eighty acres, the only method by which Ellison could recover, under the rules of law applicable to such a relationship, Anderson's proportionate part of the cost was by deducting it from the production, if the well proved to be good. However, with so many interdependent rights and burdens to be established it is not a simple proposition of determining the existence of co-tenancy. In the case of *Amis* v. *Bryan Pet. Corp.*, 185 Okl. 208, 90 P. 2d 936, an almost identical relationship existed by reason of municipal zoning ordinances controlling drilling. It was there said that,

> "Here the city created the relationship as it now exists between the parties. Had it not been for the

zoning ordinance none of the lot owners would have held an interest in the oil and gas rights beneath the lots of the others. The relationship in the nature of a tenancy in common resulted merely as an incident to the application of the city's police powers. The tenancy is entirely subject thereto. The parties cannot successfully assert their common law rights as tenants in common, for such a tenancy actually does not exist."

Expanding that statement, in another case dealing with municipal ordinances, it was said in the case of *Phillips Pet. Co.* v. *Davis*, 194 Okl. 84, 147 P. 2nd 135 that,

"The rights of non-leasing owners of lots are entirely the creations of the ordinance. The purpose and intent of the ordinance is to require lot owners to bear his proportionate share of the expense in order to participate in the production. If the owner leases his lot, he is thereby relieved from paying his part of the expenses. It is the intent of the ordinance that he pay or secure payment of his part of the expense in order to share in the whole production. In equity he ought not to be permitted to stand by and see the operator take all the chances of failure and come in and pay or offer to pay only after the venture has proved successful."

The limitation of co-tenancy rights and privileges of some of the mineral owners is no greater burden on them than is the limitation of the rights and privileges of capture of the operating mineral owners. In the case at bar, Anderson had no more justification for complaint of being required to elect whether to pay his portion of the costs or accept the fixed bonus for a lease, than Ellison had to complain of being required to share with him the object of his capture—the production from the well. Both were prerequisites to the other rights and privileges granted by the same order under authority of the same statute.

This court has, on several occasions held that unitization and pooling statutes were constitutional, where the question was raised by the producer. Such was the situation in one of the first cases to be here presented on the subject—*Patterson* v. *Stanolind Oil and Gas Co.*, 182 Okl. 155, 77 P. 2nd 83. Following and citing the *Patterson* case, was that of *Croxton* v. *State*, 186 Okl. 249, 97 P. 2nd 11. Cited and discussed in those two cases, are a majority of the opinions of various other courts, both state and federal, on the subject. Quoted in both was the following excerpt from the case of *Lombardon* v. *City of Dallas*, 124 Tex. 1, 73 S.W. 2nd and 475, to-wit:

> "All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The inflicting of such loss is not a deprivation of property without due process of law; the exertion of police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law."

That statement is applicable to the case at bar. The order complained of did not constitute a taking of property of Anderson in any manner. It granted him the right to participate in the production from a well on Ellison's property, but on condition that certain requirements were met. The limitation of one well to eighty acres was a proper exercise of the police power in furtherance of conservation of natural resources. That he was allowed to share in the production or to receive a bonus instead of that participation was a grant to him at the expense of Ellison merely because of the recognition of correlative rights. On the other hand, Ellison was not deprived of anything because he was granted the right to drill the only well which would be permitted on the eighty acre drilling unit upon condition that Anderson (and other owners of leasehold interests)

could participate in the production upon payment of his part of the cost. Both were forced to co-operate for the benefit of both and for the protection of the public generally.

The Supreme Court of the United States, in the case of *Hunter Co.* v. *McHugh*, 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 5, made the following statement, supporting it with citation of numerous earlier cases,

> "A state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment."

Citing and quoting the last above mentioned opinion, this court held similar orders valid and the statutes authorizing them to be a valid exercise of the police power, in the case of *Wood Oil Co.* v. *Corporation Commission*, 205 Okl. 537, 239 P. 2nd 1023. To the same general effect were the cases of *Spiers* v. *Magnolia Pet. Co.*, 206 Okl. 510, 244 P. 2nd 852, and *Palmer Oil Corp.* v. *Phillips Pet. Co.*, 204 Okl. 543, 231 P. 2nd 997.

A situation almost identical to that in the case at bar, was presented in the case of *Superior Oil Co.* v. *Corporation Commission*, 206 Okl. 213, 242 P. 2nd 454. Therein, the appeal attacked the reasonableness of the order rather than the constitutionality of the statute. However, the parties did present the question as to whether or not the order itself violated constitutional guaranties and it was upon that ground that three of the justices dissented. The opinion of the court was in harmony with the quoted rule in the *Hunter Co.* case, *supra*. For the same reasons, the order herein and the statute authorizing it were not invasions of the rights of Anderson, as guaranteed by the State and Federal Constitutions.

As pointed out in the above discussion, the order of the Commission did not deprive Anderson of any property rights. He was granted the right to participate in oil produced from another's well upon compliance with fixed requirements. Therefore he was not entitled to have a jury trial. This situation was in addition to the proposition that the order was regulatory and in the exercise of the police power. By such exercise, the State may do away with a cause of action and, the right to jury trial being incidental thereto, is thereafter no longer involved. *Adams* v. *Iten Biscuit Co.*, 63 Okl. 52, 162 Pac. 938. That case cites and quotes the case of *State* v. *Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, wherein many of the early cases are collected which discuss the proposition that the police power may be exercised without resort to judicial proceedings. The last two above cases dealt with the Workmen's Compensation Acts but the rules of law are the same.

For the reasons stated, the order of the Corporation Commission appealed from is affirmed.

JOHNSON, C. J. & WELCH, HALLEY, JACKSON & HUNT, JJ: CONCUR.

WILLIAMS, V. C. J. & CORN & BLACKBIRD, JJ: DISSENT.

APPENDIX B-2

FILED
IN SUPREME COURT
OF OKLAHOMA
May 8, 1956
ANDY PAYNE, CLERK.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

W. E. ANDERSON,

Plaintiff,

v

No. 36,969

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and KENNETH A. ELLISON,

Defendants,

SUPPLEMENTAL OPINION ON REHEARING

PER CURIAM:

The original opinion of this court in this case was promulgated on the 27th day of March, 1956, following lengthy and enlightening oral argument of counsel in open court. Plaintiff's petition for rehearing is in such direct conflict with statements made, and the position taken, in the argument that it is apparent that the author of the petition was not conversant therewith. In answer to inquiry by the court, plaintiff's attorney personally stated that, if the judgment of the court was adverse, plaintiff had no desire that performance bonds be required as was ordered in the case of *Superior Oil Co.* v. *Corp. Com.*, 206 Okl. 213, 242 P. 2nd 454.

Now, however, since recognition by the court of that solemn declaration has been exploited in the petition as grounds for rehearing, the opinion and decision herein is modified to the extent that our affirmance is placed upon this condition, to-wit: That Anderson within 15 days pay its share of the cost of drilling now completed and that

as to future payments Anderson may now make bond for the prompt payment thereof, the conditions and approval of the bond to be fixed by the Corporation Commission, or if Anderson pays the aggregate estimated drilling cost in advance, Ellison shall make bond guaranteeing that he will properly use and expend such money and fully account therefor, the conditions and approval of that bond to be made by the Corporation Commission.

As so modified, the opinion is affirmed and rehearing denied.

APPENDIX C

Title 52, Oklahoma Statutes 1951, § 87.1

§ 87.1 Common source of supply of oil—Well spacing and drilling units

Whenever the production from any common source of supply of oil or natural gas in this State can be obtained only under conditions constituting waste or drainage not compensated by counterdrainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this Act provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

(a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, or oil or gas within the State of Oklahoma. Such order establishing well spacing or drilling units for a common source of supply may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply,

or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen (15) days' notice of the hearing to be held upon such petition by one publication at least fifteen (15) days prior to said hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and by one publication, at least fifteen (15) days prior to the date of said hearing, in some newspaper printed in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such a petition, the procedural requirements of Sections 84 to 135, inclusive, of Title 52, Oklahoma Statutes of 1941, shall govern all proceedings and hearing provided for by this section.

(b) In establishing a well spacing or drilling unit for a common source of supply thereunder, the acreage to be embraced within each unit and the shape thereof shall be determined by the Commission from the evidence introduced at the hearing, and the following facts, among other things, shall be material:

(1) The lands embraced in the actual or prospective common source of supply (2) the plan of well spacing then being employed or contemplated in said source of supply; (3) the depth at which production from said common source of supply has been or is expected to be found; (4) the nature and character of the producing or prospective producing formation or formations; (5) any other available geological or scientific data pertaining to said actual or prospective source of supply which may be probative value to said Commission in determining the proper spacing and well drilling unit therefor, with due and relative allowance for the correlative rights and obligations of the producers and royalty owners interested therein.

The order establishing such spacing or drilling units shall set forth: (1) the outside boundaries of the surface area included in such order; (2) the size, form, and shape of the spacing or drilling units so established; (3) the drilling pattern for the area, which shall be uniform; and (4) the location of the permitted well on each such spacing or drilling unit. To such order shall be attached a plat upon which shall be indicated the foregoing information. Subject to other provisions of this Act, the order establishing such spacing or drilling units shall direct that no more than one (1) well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission, with such exception as may be reasonably necessary where it is shown, upon application, notice and hearing in conformity with the procedural requirements of Sections 84 to 135, inclusive, Title 52, Oklahoma Statutes, 1941, and the Commission finds that any such spacing unit is located on the edge of a pool and adjacent to a producing unit, or for some other reason that to require the drilling of a well at the prescribed location on such spacing unit would be inequitable or unreasonable. Whenever such an exception is granted, the Commission shall adjust the allowable production for said spacing unit and take such other action as may be necessary to protect the rights of interested parties.

(c) The Commission shall have jurisdiction upon the filing a proper application therefor, and upon notice given as provided in sub-section (a) above, to decrease the size of the well spacing units or to permit additional wells to be drilled within the established units, upon proper proof at such hearing that such modification or extension of the order establishing drilling or spacing units will prevent or assist in preventing the various types of wastes prohibited by statute, or any of said wastes, or will protect or assist in protecting the correlative rights of persons interested

in said common source of supply, or to enlarge the area covered by the spacing order, if such proof discloses that the development or the trend of development indicates that such common source of supply underlies an area not covered by the spacing order. The Commission shall not establish well spacing units of more than forty (40) acres in size covering common sources of supply of oil the top of which lies less than 9990 feet below the surface as determined by the original or discovery well in said common source of supply.

(d) The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two (2) or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests, and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit. All orders requiring such pooling shall be made after notice and

hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas. The portion of the production allocated to the owner of each tract or interests included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled thereon. Such pooling order of the Commission shall make definite provisions for the payment of cost of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon. The operator of such unit, in addition to any other right provided by the pooling order or orders of the Commission, shall have a lien on the mineral leasehold estate or rights owned by the other owners herein and upon their shares of the production from such unit to the extent that costs incurred in the development and operation upon said unit are a charge against such interest by order of the Commission or by operation of law. Such liens shall be separable as to each separate owner within such unit, and shall remain liens until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order. The Commission is specifically authorized to provide that the owner or owners drilling, or paying for the drilling, or for the operation of a well for the benefit of all shall be entitled to production from such well which would be received by the owner, or owners, for whose benefit the well was drilled or operated, after payment of royalty, until the owner or owners drilling or operating the well have been paid the amount due under the terms of the

pooling order or order settling such dispute. No part of the production or proceeds accruing to any owner of a separate interest in such unit shall be applied toward payment of any cost properly chargeable to any other interest in said unit.

For the purpose of this Act the owner, or owners, of oil and gas rights in and under an unleased tract of land shall be regarded as a lessee to the extent of a seven-eighths (7/8) interest in and to said rights and a lessor to the extent of the remaining one-eighth (1/8) interest therein. Should the owners of separate tracts or interests embraced within a spacing unit fail to agree upon a pooling of their interests and the drilling of a well on the unit, and should it be established by final, unappealable judgment of a court of competent jurisdiction that the Commission is without authority to require pooling as provided for herein, then subject to all other applicable provisions of this Act, the owner of each tract or interest embraced within a spacing unit may drill on his separately owned tract, and the allowable production therefrom shall be that portion of the allowable for the full spacing unit as the area of such separately owned tract bears to the full spacing unit.

In the event a producing well, or wells, are completed upon a unit where there are, or may thereafter be, two (2) or more separately owned tracts, any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such spacing unit shall share in the one-eighth (1/8) of all production from the well or wells drilled within the unit, or in the gas well rental provided for in the lease covering such separately owned tract or interest in lieu of the customary fixed royalty, in the proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit; provided, where a lease covering any such separately owned tract or interest included within a spacing unit stipulates a royalty in excess of one-eighth (1/8) of the production, or said lease shall be subject to an overriding

royalty, to production payment or other obligation, then the lessee of said lease out of his share of the working interests from the well drilled on said unit, shall sustain and pay said excess royalty, overriding royalty, or production payment, and therefrom meet any other obligation due in respect to the separately owned tract or interest held by him. Laws 1947, p. 328, § 1.

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In The
Supreme Court of the United States

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and KENNETH A. ELLISON,
Appellees.

MOTION TO DISMISS

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JANUARY, 1959.

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Appendix 31

In The
Supreme Court of the United States

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and KENNETH A. ELLISON,
Appellees.

MOTION TO DISMISS

Now comes the appellees, The Corporation Commission of Oklahoma and Kenneth A. Ellison, and move to dismiss the appeal herein on the grounds that:

1. The appeal does not present a substantial Federal question.

2. The judgment rests on an adequate non-Federal basis, all as appears in the statement of grounds making against the jurisdiction of this Court filed herewith.

STATEMENT OF MATERIAL FACTS

Under date of July 29, 1953, the Corporation Commission of the State of Oklahoma, acting under the authority in sub-sections (a) and (b) Sec. 87.1 of Title 52 O. S. A. and on an application filed by Sinclair Oil and Gas Company, entered its order establishing 80 acre drilling and spacing units for the production of oil and gas from the Bromide Sand Section of the Simpson Formation in an area, including the lands in question. The drilling and spacing units were formed by dividing each governmental quarter section into two rectangular units by a line East and West through the center thereof. The order further prescribed the location of the permitted wells in each unit (R. 29). It further provided that if the owners of an undivided interest within any unit so established were unable to agree on a plan for development, their rights and equities should be adjudicated by the Corporation Commission as provided by 52 Oklahoma Statutes Annotated, Sec. 87.1 (d).

On March 17, 1955, the appellee, owning leasehold interests within the unit described as the N/2 SW/4 of Section 18, Township 5 North, Range 4 West, filed an application before the Corporation Commission, reciting that he desired to drill a well on the unit and had made arrangements with all the other owners of leasehold interests in the unit except W. E. Anderson, the appellant herein, who owned what later was determined to be

18.48 per cent of the minerals within the unit. The application recited the estimated cost of the well to be drilled and prayed the Commission upon a hearing, after notice as provided by law, to establish the rights of the parties in respect to sharing the production, the cost of obtaining such production from the drilling and spacing unit, and to prescribe such other terms and conditions as might appear just, equitable and necessary (R. 17 and 18).

On March 26, 1955, W. E. Anderson, appellant herein, filed his response to the application, indicating that he did not desire to participate in the drilling of a well on the premises and that an order which conferred on applicant any rights greater than a reimbursement out of respondent's share of the production would be contrary to the applicable State statutes and to the Constitution of the State of Oklahoma (R. 23 and 24).

The matter was heard before the trial examiner for the Commission on April 1, 1955, the applicant showing among other things, that he had tried to get other owners in the unit to drill the well (R. 48); that he had made considerable effort to persuade the appellant herein to participate in the well (R. 34) and that he had a drilling obligation by virtue of the completion of a well in the unit offsetting the lands in question (R. 35). The appellant appeared before the trial examiner (R. 56). The trial examiner reported his findings to the Commission on April 4, 1955.

Thereafter, on April 11, 1955, the appellant filed his exceptions to the report of the trial examiner (R. 63-66), which exceptions were heard by the Commission. At that hearing appellant took the position that the drilling of the well involved little risk; that it was a cinch producer, and that the Commission had set the lease bonus in lieu of participation at too low a figure (R. 66A-66B).

On May 16, 1955 the appellant herein filed a motion for rehearing, requesting the Corporation Commission to reconsider and vacate its order and at the same time filed a notice of intention to appeal to the Supreme Court of the State of Oklahoma (R. 6, 7).

On June 28, 1955 and before any ruling on the notion for rehearing before the Corporation Commission, the appellant herein filed his petition in the Supreme Court of the State of Oklahoma, praying also for a Writ of Prohibition against the Commission from the exercise of its statutory powers (R. 1 to 15).

Under date of March 27, 1956 the Supreme Court of the State of Oklahoma rendered its opinion on the appeal (R. 77 to 91).

On April 11, 1956 the appellant herein filed his petition for the rehearing of said cause, which was denied under date of May 2, 1956, the court rendering a supplemental opinion and under date of February 27, 1957, the original opinion and supplemental opinion on rehearing were withdrawn and a substitute opinion adopted (R. 99

to 115). To this judgment the appellant herein filed a petition for rehearing (R. 117 to 122), which was denied under date of July 2, 1958 (R. 123).

From the final judgment of the Supreme Court of the State of Oklahoma the appellant seeks to perfect this appeal on the sole ground that the statute under which the Corporation Commission of the State of Oklahoma sought to provide for the orderly development of the lands in question, prevent waste, and protect the correlative rights of the parties in interest, as activated by the subject Commission order, is violative of Amendment XIV, Section 1, of the Constitution of the United States, in that it would deprive the appellant of his property and liberty without due process of law.

I

The appeal does not present a substantial Federal question.

"As a general rule, the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned."

16 C. J. S., Sec. 93, p. 306.

"Where a state court of last resort had upheld constitutionality of act, it would be assumed that act was constitutional on all grounds."

Grayson-Robinson Stores, Inc., v. *Lionel Corporation*, 104 A. 2d 304, 348 U. S. 859.

Statutes are presumed to be valid and constitutional and this presumption is particularly applicable to an exercise of the police power.

The issue presented in this case questions the authority of a regulatory body of the State of Oklahoma (the Corporation Commission) to regulate the drilling of a well for oil and gas into a common source of supply. Under the cases hereinafter cited, such regulation is a matter exclusively within the province of the police power of the several states.

The Corporation Commission of the State of Oklahoma was created by Article 9, Sec. 15 of the Constitution. Its powers and duties are set out in the Constitution with a further provision in Article 9, Sec. 35, that the Legislature might from time to time alter, amend, revise, or repeal the sections. It is by the Constitution given the "powers and authority of a Court of Record" (Art. IX, Sec. 19).

Twenty-one states and Alaska have passed statutes authorizing the conservation regulatory authority to regulate the spacing of wells, to establish drilling units, and to require the pooling of tracts within such units.

Alabama	The Acts of 1945 Sec. 179 (32) (c) (12)
Arizona	The Laws of 1951, Ch. 123 Sec. 17
Arkansas	Acts of 1939, No. 105, Sec. 15, p. 219
Colorado	Rev. Stat. 1953, 100-6-4
Florida	Fla. Stats. Ann. 337-22, 337-25, 337-26, 337-27, 337-28, 337-29

Georgia	Ga. Code Ann., S. 43-713 L, S 43-716, S 43-717
Illinois	Laws of 1951, Ch. 104, S 83
Indiana	Burns' Ind. Ann. Stat. 1953, Tit. 46-1714
Louisiana	Louisiana Stats. Ann. R. C. 30: 4C (3), 9ABCD
Michigan	Comp. Laws 1948, Tit. 319.6 (j) 319.13, 319.70
Mississippi	1942 Code Ann., Laws of 1956, Ch. 163, Sec. 1
Montana	Laws 1953, Ch. 238, Tit. 4C (2), 6, 7, 8
Nevada	Laws 1953, Ch. 202, Sec. 6
New Mexico	Stats. 1953, Sec. 65-3-11
North Carolina	Stats. 113-393a
N. Dakota	Laws 1953, Ch. 227, Tit. 5, 2c, 8, 9, 10, 11
Oklahoma	52 Okla. Stats. Ann. Tit. 87.1, 286.16
S. Dakota	SD Code, 42.706 (3) (o) (Laws 1953, Ch. 220, Sec. 1)
Utah	Utah Code Ann. 1953, Laws of 1955, Ch. 65, Sec. 8
Washington	Laws, 1951, Ch. 146, Tit. 19 (1), 22, 23, 24, 25, 26, 27
Wyoming	Wyoming Comp. Stats. 1945 Laws of 1951, Ch. 94, Sec. 3 (Appearing in 1957 Suppl.)
Alaska	Laws 1955, Ch. 40, Sec. 6, 1-5, inc.

All courts which have passed on these statutes, providing for compulsory pooling have held such laws to be free of constitutional objections. Thus far, these cases have reached the courts chiefly from Louisiana, Mississippi and Oklahoma.

The Louisiana statute was approved by the Supreme Court of that State in *Hunter Company* v. *McHugh*, 202 La. 97, 11 So. 2d 495, appeal dismissed 320 U. S. 222. This holding approved in *Chrichton* v. *Lee*, 25 So. 2d 229.

The Oklahoma Statutes have been approved in *Patterson* v. *Stanolind Oil and Gas Co.*, 77 P. 2d 83, 305 U. S. 376, and *Croxton* v. *State*, 97 P. 2d 11 (1935 Act); *Wood Oil Company* v. *Corporation Commission*, 239 P. 2d 1023 and 268 P. 2d 878 (1945 Act); *Anderson Prichard Oil Corporation* v. *Corporation Commission*, 241 P. 2d 363, approving *Patterson* v. *Stanolind Oil and Gas Co., supra;* and, *Superior Oil Company* v. *Corporation Commission*, 242 P. 2d 454; *Panhandle Eastern Pipe Line Co.* v. *Corporation Commission of Oklahoma*, 285 P. 2d 847; *Wakefield* v. *State of Oklahoma*, 306 P. 2d 305, and the case at bar. In the last four cases, the Oklahoma Supreme Court approved the constitutionality of the statute in question. The act has been held constitutional by the Court of Appeals (10th Circuit) in *Panhandle Eastern Pipe Line Co.* v. *Isaacson*, 255 Fed. 2d 669.

The Mississippi statute has been approved by the Supreme Court of Mississippi in a number of cases beginning in 1952 involving the validity of compulsory pooling: *Green* v. *Superior Oil Co.*, 59 So. 2d 100; *Hutchins* v. *Humble Oil & Ref. Co.*, 59 So. 2d 103; *Superior Oil Co.* v. *Foote*, 59 So. 2d 85; *Superior Oil Co.* v. *Griffith*, 59 So. 2d 104; *Superior Oil Co.* v. *Morgan*, 59 So. 2d 105; *Superior Oil Co.* v. *Berry*, 64 So. 2d 357. In *Superior Oil Co.* v. *Foote, supra*, the court said:

> "Hence it is said that all contracts and property rights are subject to a reasonable exercise of the police power. The decisions from other states which have passed on compulsory pooling statutes have consistently applied these principles in holding that such a statute is within the police power of the state, in order to prevent waste, to conserve natural resources, and to protect correlative rights of the owners in a common source of supply."

In *Superior Oil Co.* v. *Foote, supra*, the court held:

> "That an attribute of sovereignty, such as the police power of the state, to conserve its natural resources needs no constitutional sanction for its valid exercise, since it is a power inherent in the existence of a government."

When two or more separately owned tracts are embraced within an established drilling unit, the owners thereof may agree to pool their interests and develop their tract as a drilling unit. If such owners do not thus agree, the Conservation Agency *may* require them to do so. In Alabama, Arkansas, Florida, Illinois, North Carolina, North Dakota and Oklahoma, this word is "shall."

There is uniform authority that a compulsory unitization may be effected to protect the correlative rights of the mineral owners.

Thompson v. *Consolidated Gas Co.*, 300 U. S. 55;
Bandini Petroleum Co. v. *Superior Ct.*, 284 U. S. 8;
Oxford Oil Co. v. *Atlantic Oil Producing Co.*, 22 F. 2d 597, 277 U. S. 585, and
Walls v. *Midland Carbon Co.*, 254 U. S. 300.

In many of the cases the courts have specifically held that there was no taking of property without due process of law, impairment of the obligation of contracts, interference with interstate commerce, or unconstitutional delegation of legislative power.

Champlin Refining Co. v. *Corporation Commission*, 286 U. S. 10;
Walls v. *Midland Carbon Co., supra;*
Danciger Oil & Ref. Co. v. *Railroad Commission*, 49 S. W. 2d 837;
Oxford Oil Co. v. *Atlantic Oil Producing Co., supra;*
Ohio Oil Co. v. *Indiana*, 177 U. S. 190;
People v. *Associated Oil*, 211 Cal. 93, 294 P. 717;
Bandina Petroleum Co. v. *Superior Court, supra.*

The pertinent parts of the order of the Corporation Commission to which the appellant takes exception are as follows:

"IT IS FURTHER ORDERED that the Respondent, W. E. Anderson, be and he is hereby authorized

and permitted to participate in the working interest in said well by paying his proportionate share of the cost of drilling and completion thereof and to receive his proportionate share of the working interest therein.

"IT IS FURTHER ORDERED that in the event the said W. E. Anderson does not desire to participate in said well, that he have the option of taking a lease bonus of $800.00 per acre for the acreage owned by him in the N½ of the SW¼ of said Section 18.

"IT IS FURTHER ORDERED that the said W. E. Anderson shall have thirty (30) days from the date of this order within which to make an election as to which alternative he desires to accept, and that in the event he does not make such election, it will then be presumed that he has elected to take the said $800.00 per acre bonus for the acreage owned by him underlying said tract.

"IT IS FURTHER ORDERED that in the event the respondent elects to participate in the working interest in said well and there is a dispute as to the cost of the drilling and completion thereof, the Commission herein specifically reserves jurisdiction to determine said costs."

In the final opinion of the Supreme Court of the State of Oklahoma (R. 114-115) the court points out that the only thing appellant was required to do by reason of the order of the Corporation Commission was to elect within thirty (30) days from the final order of the Commission whether he would participate in the drilling and operation of the well, or whether he would sell his leasehold rights (in the horizon to be developed) for the consideration fixed by the Commission.

Until such time as the appellant elected to participate there was no necessity for making provision for the execution of a bond to guarantee performance by appellee. (NOTE: At the time this issue concerning the performance bond was first raised in the Supreme Court of Oklahoma the well had already been drilled and was on production.)

The impact of the spacing law is directed at a common source of supply of oil and gas which, by the Act, [Title 52 O. S. A. Section 861, sub-division (c)], is defined as a common accumulation of oil and gas separated from all other such accumulations. All references in the Act to the drilling of wells likewise relate to the common source of supply involved, and all pooling orders predicated on a prior spacing order are likewise limited to the common source of supply involved.

Since the Act also separates the mineral interest into a one-eighth free royalty and a seven-eighths working interest, it follows that any order determining that a non-participating lessee is entitled to a lease bonus does not actually contemplate the execution of a written instrument or a contract between the parties. The accomplishment is that, as to the common source of supply involved, the non-participating lessee will receive a bonus or a fixed sum as the worth of this forgiven right to participate in the development.

In order that this Court may properly have before it the Oklahoma spacing law, it is set forth in full as an appendix to this motion.

The appellant had his "day in court" at all stages of the proceedings in which the Corporation Commission and the Supreme Court of Oklahoma were attempting to determine the correlative rights of the parties, and should not be here heard to complain that the court authorized appellee to drill the well in question and gave appellant thirty days to decide whether to participate in the drilling (as all the other mineral lessees had already voluntarily agreed to do) or to accept a prescribed bonus for a lease as to his mineral interest in the subject matter of the pooling order; that is, the participation rights in the spaced common source of supply (the Bromide sand) underlying the pooled unit.

This case does not involve any question as to the reasonableness of the order in question, but is directed solely to the authority of the Commission under the Statute to make the order.

What should be here pointed out is that a property right is not absolute.

> "In Oklahoma, as generally elsewhere, landowners do not have absolute title to the gas and oil that may permeate below the surface. These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession, including that coming from the lands belonging to others, but the right to take and thus acquire ownership is subject to the reasonable exertion of the power

of the state to prevent unnecessary loss, destruction, or waste."

Champlin Refining Co. v. *Corporation Commission*, 286 U. S. 210.

That a state may, in the interest of conservation, lawfully limit the number of wells to be drilled is beyond question. But as a corrolary to so limiting the number of wells within a given area, and to make constitutional such limitation, a procedure must be provided whereby all of the owners of minerals within such a unit may properly share both the cost and the recoveries. In the instant case, after the spacing order was entered either Anderson or Ellison could have drilled a well, but both could not. Ellison elected to drill, and to protect Anderson's rights, the Oklahoma Corporation Commission gave Anderson time within which to elect whether he desired to participate or to accept a bonus in lieu of his right to separately develop the spaced Bromide sand horizon.

To finalize the matter, the order further directed that if appellant did not elect to participate in the drilling or to accept the lease bonus fixed by the Commission for his lease, "it would be presumed that he has elected to take the bonus."

It has been held that Boards of Adjustment created under the Oklahoma Statutes with power to regulate property uses within a municipality may create drilling units for the production of oil and gas and, although not ex-

pressly authorized to do so, may, in granting a permit to drill a well, fix the amount of lease bonus for those mineral owners not participating in the drilling of the well, or may require a deposit or a bond for the payment of any owner's proportionate part of the drilling and equipping a well upon the unit so created. This difference must be noted. The peace, health and safety branch of the police power, under which Boards of Adjustment acted, operated only on well limitations and not on productive horizons, so in fixing lease bonuses the Board was not limiting the rights acquired by the permittee to one horizon only. See *Amis* v. *Bryan Petroleum Corporation*, 185 Okl. 206, 90 P. 2d 936. The Corporation Commission's power springs from the right to prevent waste and protect correlative rights. But under both, the authorized tribunal must resolve the rights of all interested parties to drill, operate, pay for and share in the permitted well. In the *Amis* case the alternatives granted the non-consenting owners were the same as in the instant case. The court recited such rights to be:

> "The permit as issued fixed certain conditions in the nature of bonuses and royalties to be paid those lot owners who had not joined in the lease upon their execution to respondent of a standard oil and gas lease upon their respective lots. The board also fixed the percentage of royalty to be paid to such owners. There was the further condition that said lot owners might, in lieu of bonuses, participate in the working interest in the well to the extent of their proportionate part of the area by posting bond in a certain sum guaran-

> teeing to respondent payment of their portion of the expense of drilling, granting to the owners the right to elect within ten days after prescribed notice whether to accept the bonuses or to post bond and participate in the working interest as aforesaid."

Appellants therein contended that the drilling lessee should have been required to take appellant's share of the production in payment of appellant's share of the development costs and that the provided election should not have been forced on them. The court said:

> "So far as the production of oil and gas within the city limits is concerned, the ordinance is clearly within the powers delegated by the statute. The statute authorizes the board of adjustment to see that substantial justice is done among the parties. The ordinance recognizes that power in the board, and has proceeded to apply it in cases of oil and gas production, authorizing said board to enter such orders as will be equitable and just. Substantial justice as applied and used in this instance would require an adjudication of the legal and equitable rights of all parties whose property is affected by the city ordinance so far as those rights pertain to the oil and gas beneath the block. It would include an equitable allocation of the production to each unit of ownership, the determination of the lease value and the fixing of the bonus therefor to which each non-leasing owner is entitled, and the percentage of royalties. Those powers are judicial, and the board's order determining those matters is to that extent an adjudication."

It was held in *Anderson-Prichard Oil Corp.* v. *Corporation Commission*, 205 Okl. 672, 241 P. 2d 363, that the conservation statute relating to a division of production between owners and the protection of correlative

rights did not violate constitutional provisions nor is such legislation a taking of property without compensation. In the body of the opinion it is said:

> "In *Russell* v. *Walker*, 160 Okl. 115, 15 P. 2d 114, 115, this Court said in the first syllabus: 'Under the police power of the state, the Legislature may regulate and restrict the use and enjoyment of landowners of the natural resources of the state, such as oil and gas, so as to protect them from waste, and prevent the infringment of the rights of others. Such legislation does not infringe the constitutional inhibitions against taking of property without due process of law, denial of the equal protection of the laws, or taking property without just compensation.'
>
> "In 2 Constitutional Limitations (8th Ed.), pages 1319-1320, it is said: 'The legislature may also regulate and restrict the use and enjoyment of landowners of the natural resources of the state such as subterranean waters, gas, oil, and timber, so as to protect them from waste and prevent the infringement of the rights of others. *Such legislation does not infringe the constitutional inhibitions against the taking of property without due process of law, denial of equal protection of the laws, or taking property without just compensation*'." (Emphasis supplied.)

A later consideration of the statute involved in the case at bar and a Corporation Commission order entered pursuant thereto, appears in the appeal of *Panhandle Eastern Pipe Line Co.* v. *Corporation Commission*, 285 P. 2d 847, where the court said:

> "The key to the cause of Pan-East's complaint concerning the well-spacing order is the Order's paragraph 8, which contemplates subsequent determinations, as provided by Tit. 52 O. S. 1941 and 1951, Sec.

87.1 (d), such as were announced by the Commission in the two 'pooling' orders (Nos. 28332 and 28333, *supra*); that said Company must share in the same proportion, its working interest in, and 7/8ths part of the production from, said well in Section 31 with Carter, Embry Kay and Leon J. Caine, and, likewise the working interest and such share of production from its Clapp well in Section 25, with the owners of the other three-fourths of that unit, which are Huber and Sohio."

There was further complaint about the formula of participation established. This Court said:

"* * * Such a formula of participation is a reasonable and logical one (if perhaps not the most complete or accurate one that may be used when more sub-surface information becomes available) and the orders in this case, like the well-spacing Act, therefore cannot be said to be invalid or unconstitutional on the ground that said formula bears no reasonable relation to the purpose of protecting correlative rights—a *purpose which is no longer open to dispute as a constitutional ground* for the exercise of the State's police power. See *Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okl. 155, 77 P. 2d 83, appeal dismissed 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231, and the discussion in connection with its citation in *Wood Oil Co.* v. *Corporation Commission*, 268 P. 2d 878, 884. Appellants also quote expressions from our opinion in *Application of Peppers Refining Co.*, Okl., 272 P. 2d 416, concerning the importance of protecting correlative rights over securing to some owners maximum drilling and productive profits. Those expressions do not strengthen appellants' position here, for the Commission, by its orders, has in effect, determined that their correlative rights will not be violated by the well-spacing and pooling therein directed, and, as we have seen, appellants have failed to discharge their

burden of establishing that such determination is not sufficiently supported by the evidence. See *Grison Oil Corp.* v. *Corporation Commission*, 186 Okl. 548, 99 P. 2d 134. In the *Peppers Refining Co.* case, we determined that the appellants discharged that burden at least insofar as applicable to one of the leases involved" (Emphasis supplied).

The Unitization Act, 52 O. S. A., Section 286.1-287.15, is closely related to the provisions of the act under consideration in this appeal. It involves a more far reaching adjustment of individual rights in the development of oil and gas reservoirs. Separate rights throughout a reservoir are eliminated and in their stead each owner is given a right, by paying, to share in the production of the whole. If he does not pay he loses his participating right through a foreclosure. The same reasoning as to the validity of the unit action applies as to the validity of the spacing act. The courts have consistently upheld the constitutionality of the Unitization Act. See *Palmer Oil Corp.* v. *Phillips Petroleum Co.*, 231 P. 2d 997. Appeal dismissed, 72 Supreme Court 842, 343 U. S. 390; *Spears* v. *Magnolia Petroleum Company*, 244 P. 2d 843, and *Spears* v. *Magnolia Petroleum Company*, 244 P. 2d 850, and *Spears* v. *Magnolia Petroleum Co.*, 244 P. 2d 852; *Woody* v. *Corporation Commission*, 265 P. 2d 1102.

The appellant's argument to the effect that Anderson, if compelled to put up his share of the cost or take a lease bonus, is being unconstitutionally deprived of his

property for the benefit of Ellison overlooks the basic purposes of a spacing law, and overlooks the following legislative mandate:

> "All orders requiring such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas."
>
> Title 52 O. S. A., 87.1, Sub-paragraph (d).

The questioned statute was held constitutional by the Supreme Court of the State of Oklahoma, *Wakefield* v. *State*, 306 P. 2d 305. Because this case is so nearly parallel to the case before the Court, we desire to call it especially to the Court's attention. Herein, the Texas Company filed an application before the Corporation Commission for an order pooling the individual mineral estates in the drilling unit involved, and after notice and hearing, the Corporation Commission entered an order as follows:

> "'1. That The Texas Company be and it is hereby authorized to drill and produce a well for the production of natural gas from the Morrow Sands common source of supply in the drilling and spacing unit described as Section 27, Township 5 North, Range 25 East, in Beaver County, Oklahoma, and take the full allowable of production therefrom.
>
> "'2. That all persons owning leasehold interests within said spacing unit shall have the right to participate in the cost of drilling of said well and in the production therefrom upon the payment by them of their proportionate share of the cost of the completion of said well and the sum of $107,000.00 is hereby fixed as the cost of said well.

"'3. That in the event there is a dispute as to said cost after drilling and completion thereof, the Commission reserves jurisdiction for the purpose of determining said cost.

"'4. That those parties who do not desire to participate in said well shall have the option of accepting $25.00 per acre as mineral compensation or bonus for their lease, and unless said parties make an election within 10 days from the date of this order to participate in the working interest in said well, then it will be presumed that they have elected to accept the bonus of $25.00 per acre fixed herein'."

One of the mineral owners, Wakefield, objected to the validity of the order on the grounds that it created "enforced tenancy in common, that the financial consideration to the parties was considered as an element determining the issues and that the constitutional rights of the complainant were thereby violated." The Supreme Court sustained the order of the Commission and cited with approval the case of *Superior Oil Company* v. *Oklahoma Corporation Commission*, 242 P. 2d 454, wherein the court held:

"* * * The Corporation Commission has a wide discretion in the performance of its statutory duties. We cannot substitute our judgment on disputed questions of fact unless the findings of the commission are not as commanded by the Constitution, supported by the law, and substantial evidence.

* * * * * * * * *

"In cases coming before us, we find that the commissions' orders have been in the alternative, that is, to make a cash deposit or submit an approved bond to secure the operator in his costs in the drilling op-

erations. *Amis* v. *Bryan Petroleum Corp.*, 185 Okl. 206, 90 P. 2d 936; *Denver Producing & Refining Co.* v. *State*, 199 Okl. 60, 182 P. 2d 503."

The next expression of the Supreme Court of the State of Oklahoma as to the constitutionality of the statute in question is in *Application of Gulf Oil Corporation*, 313 P. 2d 1101, wherein it is recited that:

> "The Corporation Commission has a wide discretion in the performance of its statutory duties and reviewing court may not substitute its judgment on disputed questions of fact for that of the commission, unless the findings of commission are not supported by the law and substantial evidence, 52 O. S. 1951, Sec. 87.1 (d); O. S. 1951 Const., Art. 9, Sec. 20."

The appellee and the other lessees who had agreed to participate in the drilling of a well on the unit had an obligation under their leases to drill the well since production had been obtained on the adjoining unit. All of the mineral owners, including the appellant, were entitled to have their correlative rights protected by the drilling of the well in question.

We should observe finally that the Corporation Commission of the State of Oklahoma, charged with the regulation of the oil industry, has approved hundreds of identical pooling orders, giving the non-assenting party a choice of two options, i. e., to participate in the well, or to accept a bonus. If this procedure was not supplied to the pooling statute, the creation of a drilling and spacing unit into which, under the laws, only one well might be drilled

would be meaningless, because any non-assenting party for any reason might block the drilling of a well to the detriment of the interests of all the other parties owning either minerals or leasehold estates within the unit. As we have heretofore pointed out, the rights of an individual owner of minerals or leasehold within the unit, must, under the conservation statutes and the protection of correlative rights of the other parties, be in some instances subordinate to the right of the regulatory authority to control an orderly development.

The foregoing is a general answer to appellant's contention that his constitutional rights have been violated. There is a more specific answer to his contentions.

Restated, his basic contention is that by the application of this "new fangled" conservation law he has been deprived of "common law" rights which existed between mineral cotenants. The sophistry of this argument is the assumption that appellant and appellee are mineral cotenants. In fact they are not. Anderson owns minerals under the Northwest Quarter of Southwest Quarter. The well was drilled upon the Northeast Quarter of Southwest Quarter (Tr. page 17). Anderson owns no minerals under the tract on which the well was drilled. The relationship between the appellant and appellee is a legally created set of co-equal rights which only superficially resemble the rights of cotenants. Anderson would have no rights in the well or the production therefrom except for the spac-

ing law and the pooling order. Anderson's complaint is that the law which created his rights imposed restrictions thereon which are unpalatable to him. The legally created relationship, or rights, which are not those of cotenancy, may be conferred with such limitations as the authors deem necessary to properly distribute the benefits thereof.

Amis v. *Bryan Petroleum Co.*, 185 Okl. 206, 90 P. 2d 936.

But assuming, without conceding, that Anderson is correct in his assumption that the relationship created by the pooling order is the equivalent of a "common law" mineral cotenancy, in that relationship he would have a right to join in the payment of the development costs and fully participate from first production. That right he had under the pooling order, but refused to avail himself of it. Having refused to participate, as a common law co-tenant, all of Anderson's share of the production would belong to Ellison until all of Anderson's share of the cost of drilling, completing, equipping and operating the well had been recovered from the sale of such share of the production.

Gypsy Oil Co. v. *Marsh*, 121 Okl. 135, 248 P. 329.

Anderson would not during such time receive a one-eighth free of cost, as a royalty. During such time, as a mineral—not a lease-owner, he would receive nothing. Under the pooling order, which permits him to share in

a well drilled by another on such other's land, he receives from first production a proportionate one-eighth as a royalty, free and clear, and the sum of $800.00 for each mineral acre owned as compensation, not for the loss of right of participation—he had that right, but did not choose to go—but as compensation for the fact that the creating law did not confer upon him a right to participate in the seven-eighths leasehold production without paying his share of the cost.

We say the law, the conferring law, the additional rights conferred, all treat Anderson fairly—more than fairly. He cannot urge that his constitutional rights are violated because more rights were not conferred upon him.

II

The judgment rests on an adequate non-Federal basis.

An elementary observation on statutory construction appears to be in order. This Court approved in *Palmer Oil Corporation* v. *Phillips Petroleum Co.*, 343 U. S. 390, the proposition that:

> "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary, capricious, and unreasonable, and hence irreconcilable with the conception of due process of law."

This case, as above set out, established the constitutionality of the Unitization Act of Oklahoma (52 O. S. A., Sec. 286.1-286.17).

A reading of the statute questioned in this case leaves clear its meaning. There is no doubt of the intent of the legislature and it made such intent clear by the wording of the statute. The Corporation Commission is authorized by the statute to "*make definite provisions for the payment of cost of development and operation.*" The statute also further empowers the Commission to require a pooling "*upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas.*" "*The owner of such tract*" refers naturally not only to the applicant for the compulsory pooling order but also to any other owner (such as appellant) who does not necessarily desire to drill (Emphasis supplied).

The entire tenor of appellant's brief in support of jurisdictional statement is that the statute in question is unconstitutional because it would *compel* appellant to become a mining co-partner with another or to accept a bonus for a lease on his mineral rights against his will. Reference to the order complained of will demonstrate that appellant has *not been required* to elect either of the alternatives set out by the Commission. Appellee is

bound by any election appellant might make but appellant can accept either alternative or neither of them.

Appellant did not elect either alternative offered by the Commission and upon affirmance of the Commission's order by the Supreme Court of the State of Oklahoma, appellant filed a supersedeas bond (in the sum of $10,000.00) and the enforcement of the mandate in the Corporation Commission has been further stayed pending an appeal to this Court, or until the further orders of the Supreme Court of the State of Oklahoma (R. 132).

This Court, in each of the cases reaching it, questioning the validity of the Oklahoma compulsory pooling statutes, has recognized that such statutes deal with a matter of exclusive state concern and have held that no substantial Federal question is involved.

> *Patterson* v. *Stanolind Oil & Gas Co.*, 77 P. 2d 83, appeal dismissed 305 U. S. 376;
>
> *Palmer Oil Corporation* v. *Phillips Petroleum Co.*, 231 P. 2d 997, appeal dismissed 343 U. S. 390;
>
> *Anderson-Prichard Oil Corporation* v. *Corporation Commission et al.*, 241 P. 2d 363, appeal dismissed 342 U. S. 938.

All of the cases dealing with compulsory pooling and unitization statutes have held them to be within the police power of the State. The history of these cases upholding compulsory pooling attest to an enlightened point of view wherein the valuable property rights of the few are obliged to yield to the public interest.

As early as 1900, this Court, in the case of *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, held that as to gas and oil, a surface proprietor had no absolute right therein until it is reduced to possession; that as to a common source of supply there is a "coequal" right in all the surface owners affected to take production from the common source of supply; and that the use by one such owner of his right to obtain might result in waste or "annihilation of the rights of the remainder." Going further this Court said:

> "Hence it is that the legislative power, from the peculiar nature of the right and objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

Finally, the opinion concludes by holding that the Statute with which it was concerned was "but a regulation of the State of Indiana of a subject which especially comes within its lawful authority."

Thus, we submit, that the appeal involved herein does not involve a substantial Federal question and that the judgment of the Supreme Court of the State of Oklahoma appealed from rests on an adequate non-Federal basis and that this Court should deny jurisdiction.

Respectfully submitted,

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JANUARY, 1959.

APPENDIX A

TITLE 52 O. S. A.

Sec. 87.1 COMMON SOURCE OF SUPPLY OF OIL-WELL SPACING AND DRILLING UNITS

Whenever the production from any common source of supply of oil or natural gas in this State can be obtained only under conditions constituting waste or drainage not compensated by counter-drainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this Act provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

ESTABLISHMENT OF UNITS

(a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall

have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, of oil or gas within the State of Oklahoma. Such order establishing well spacing or drilling units for a common source of supply may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen (15) days' notice of the hearing to be held upon such petition by one publication at least fifteen (15) days prior to said hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and by one publication, at least fifteen (15) days prior to the date of said hearing, in some newspaper printed in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such a petition, the procedural requirements of Sections 84 to '35, inclusive, of Title 52, Oklahoma Statutes of 1941, shall govern all proceedings and hearing provided for by this section.

ACREAGE OF UNIT—ORDER ESTABLISHING

(b) In establishing a well spacing or drilling unit for a common source of supply thereunder, the acreage to be embraced within each unit and the shape thereof shall be determined by the Commission from the evidence introduced at the hearing, and the following facts, among other things, shall be material:

(1) The lands embraced in the actual or prospective common source of supply (2) the plan of well spacing then being employed or contemplated in said source of supply; (3) the depth at which production from said common source of supply has been or is expected to be found; (4) the nature and character of the producing or prospective producing formation or formations; (5) any other available geological or scientific data pertaining to said actual or prospective source of supply which may be of probative value to said Commission in determining the proper spacing and well drilling unit therefor, with due and relative allowance for the correlative rights and obligations of the producers and royalty owners interested therein.

The order establishing such spacing or drilling units shall set forth: (1) the outside boundaries of the surface area included in such order; (2) the size, form, and shape of the spacing or drilling units so established; (3) the drilling pattern for the area, which shall be uniform; and (4) the location of the permitted well on each such spacing or drilling unit. To such order shall be attached a plat

upon which shall be indicated the foregoing information. Subject to other provisions of this Act, the order establishing such spacing or drilling units shall direct that no more than one (1) well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission, with such exception as may be reasonably necessary where it is shown, upon application, notice and hearing in conformity with the procedural requirements of Sections 84 to 185, inclusive, Title 52, Oklahoma Statutes, 1941, and the Commission finds that any such spacing unit is located on the edge of a pool and adjacent to a producing unit, or for some other reason that to require the drilling of a well at the prescribed location on such spacing unit would be inequitable or unreasonable. Whenever such an exception is granted, the Commission shall adjust the allowable production for said spacing unit and take such other action as may be necessary to protect the rights of interested parties.

DECREASE OF SIZE OF UNITS—ADDITIONAL WELLS—ENLARGEMENT OF AREA—SIZE OF UNITS WHEN OIL WITHIN 9990 FEET OF SURFACE

(c) The Commission shall have jurisdiction upon the filing a proper application therefor, and upon notice given as provided in sub-section (a) above, to decrease the size of the well spacing units or to permit additional wells to

be drilled within the established units, upon proper proof at such hearing that such modification or extension of the order establishing drilling or spacing units will prevent or assist in preventing the various types of waste prohibited by statute, or any of said wastes, or will protect or assist in protecting the correlative rights of persons interested in said common source of supply, or to enlarge the area covered by the spacing order. If such proof discloses that the development or the trend of development indicates that such common source of supply underlies an area not covered by the spacing order. The Commission shall not establish well spacing units of more than forty (40) acres in size covering common sources of supply of oil the top of which lies less than 9990 feet below the surface as determined by the original or discovery well in said common source of supply.

VIOLATION OF ORDER—SEPARATELY OWNED TRACTS OR UNDIVIDED INTERESTS—POOLING COSTS

(d) The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such

well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two (2) or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests, and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit. All orders requiring such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas. The portion of the production allocated to the owner of each tract or interests included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled thereon. Such pooling order of the Com-

mission shall make definite provisions for the payment of cost of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon. The operator of such unit, in addition to any other right provided by the pooling order or orders of the Commission, shall have a lien on the mineral leasehold estate or rights owned by the other owners herein and upon their shares of the production from such unit to the extent that costs incurred in the development and operation upon said unit are a charge against such interest by order of the Commission or by operation of law. Such liens shall be separable as to each separate owner within such unit, and shall remain liens until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order. The Commission is specifically authorized to provide that the owner or owners drilling or paying for the drilling, or for the operation of a well for the benefit of all shall be entitled to production from such well which would be received by the owner, or owners, for whose benefit the well was drilled or operated, after payment of royalty, until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order

or order settling such dispute. No part of the production or proceeds accruing to any owner of a separate interest in such unit shall be applied toward payment of any cost properly chargeable to any other interest in said unit.

For the purpose of this Act the owner, or owners, of oil and gas rights in and under an unleased tract of land shall be regarded as a lessee to the extent of a seven-eighths (7/8) interest in and to said rights and a lessor to the extent of the remaining one-eighth (1/8) interest therein. Should the owners of separate tracts or interests embraced within a spacing unit fail to agree upon a pooling of their interests and the drilling of a well on the unit, and should it be established by final, unappealable judgment of a court of competent jurisdiction that the Commission is without authority to require pooling as provided for herein, then subject to all other applicable provisions of this Act, the owner of each tract or interest embraced within a spacing unit may drill on his separately owned tract, and the allowable production therefrom shall be that portion of the allowable for the full spacing unit as the area of such separately owned tract bears to the full spacing unit.

In the event a producing well, or wells, are completed upon a unit where there are, or may thereafter be, two (2) or more separately owned tracts, any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such

spacing unit shall share in the one-eighth (1/8) of all production from the well or wells drilled within the unit, or in the gas well rental provided for in the lease covering such separately owned tract or interest in lieu of the customary fixed royalty, in the proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit; provided, where a lease covering any such separately owned tract or interest included within a spacing unit stipulates a royalty in excess of one-eighth (1/8) of the production, or said lease shall be subject to an overriding royalty, to production payment or other obligation, then the lessee of said lease out of his share of the working interests from the well drilled on said unit, shall sustain and pay said excess royalty, overriding royalty, or production payment, and therefrom meet any other obligation due in respect to the separately owned tract or interest held by him. Laws 1947, p. 328, Sec. 1.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF OKLAHOMA, and
KENNETH A. ELLISON,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

BRIEF OPPOSING MOTION TO DISMISS

LUTHER BOHANON,
Liberty National Building,
Oklahoma City 2, Oklahoma,

LEON S. HIRSH,
Oklahoma Natural Building,
Oklahoma City 2, Oklahoma,

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STERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8780

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In the
Supreme Court of the United States
OCTOBER TERM, 1958

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF OKLAHOMA, and
KENNETH A. ELLISON,
Appellees.

BRIEF OPPOSING MOTION TO DISMISS

PRELIMINARY STATEMENT

In their brief in support of the Motion to Dismiss, counsel for Appellees have indulged the same line of illogical approach to the issues as resulted in the apparent confusion of the five members of the Oklahoma Supreme Court who caused rendition of the judgment here on appeal.

Although it is felt that our Jurisdictional Statement anticipated and demonstrated the fallaciousness of the premises upon which those arguments are sought to be founded, a brief summarization of the reasons why the arguments of counsel are unsound should not be amiss.

This summary will be separated into the two topics discussed in the brief in support of the Motion to Dismiss: First, the substantiality of the Federal questions, and Second, the inevitability of the adequate Federal questions involved in the State Court judgment.

ARGUMENT

I.

Substantiality of the Federal Questions

In their approach to their argument, counsel seek to oversimplify the issues by the statement that Appellant questions the authority of a regulatory body of the State of Oklahoma "to regulate the drilling of a well for oil and gas into a common source of supply" (Motion to Dismiss, p. 6). And, they then present an extended list of States wherein well-spacing and pooling statutes have been enacted and upheld.

Such an approach is neither a fair statement of the issues, nor are the obvious implications of the "roll-call of States" anything other than an attempt to pervert our position by innuendo.

In our Jurisdictional Statement, page 21, it was quite clearly stated that Appellant *does not challenge either the propriety or legality of conservation legislation of this sort.* Our objection is to this particular attempted extension of legitimate regulatory authority—an expansion of governmental regulations founded upon the laudable objective of "conservation" into an entirely new field, the compulsory participation in exploration.

Of the numerous decisions cited by counsel in support of the constitutionality of well-spacing and pooling legislation, all except one—*Wakefield* v. *State*, 306 P.2d 305—*limit their consideration solely to the conservation aspects of the legislation.* None, except the *Wakefield* case, indicate that any of the courts ever anticipated that the legislation they were approving would be extended to the promotion of any objective other than conservation. *And the Wakefield decision, by the Oklahoma Supreme Court, was founded solely upon its decision in the instant case on appeal.*

An analytical examination of the positions taken by the Appellant and the Appellees will show that Appellees, rather than supporting the principle of spacing units as a vehicle of conservation, actually are seeking to destroy its efficacy for such purposes. While, on the other hand, Appellant is relying upon the validity of the legislation establishing the unit as the very foundation of his contentions.

Seizing upon the pure coincidence that the location designated by the Commission for the single well authorized for the unit happened to be on Ellison's small portion of the unit, Appellees' arguments, and the Oklahoma Supreme Court's opinion, erroneously treat the well as *Ellison's well.* Such a construction of pooling legislation would destroy the very essence of its objectives.

The wording of the law, and its prior construction by the Oklahoma court, make it clear that any well drilled on the unit *belongs to the several interest-owners in the unit,* and the operator is merely one interest-owner desig-

nated by the Commission to be permitted to develop *the unit*.

The ownership of the leasehold overlying the portion of the unit fixed as the proper well-site is not the determining factor in designation of the operator. In the case of *Superior Oil Company* v. *Oklahoma Corporation Commission*, 206 Okla. 213, 242 P.2d 454, the Commission was dealing with a situation where two interest-owners both were seeking designation as the sole operator; and one interest-owner was given authority to drill on the leasehold surface of another interest-owner.

In this case, assuming that Anderson had sought the right to drill, had shown his superior experience to Ellison as an oil operator, his greater financial resources to enable him to "carry" dissenting interest-owners, his greater *quantum* of interest in the unit than Ellison's and other pertinent facts that would have rendered it unreasonable for the Commission not to select him as the operator instead of Ellison, the mere fact that the designated well-site was on a portion of the unit leased to Ellison still would have required an order that Anderson drill the unit well at the designated location. And, it would not have been *Anderson's well;* but the well of *all of the unit interest-owners*, whether or not they actively participated in the drilling operations.

That absolutely essential component of the mechanics of pooling regulation was recognized by the Oklahoma court in its opinion in the *Superior Oil Company* case, *supra;* and that recognition in itself distinguished the legal principles involved in pooling from those involved in the

municipal zoning decisions which we discussed in the Jurisdictional Statement.

If the position of the Appellees, and that used by the Oklahoma court in this case, were correct—and the well should be considered Ellison's well merely because it is located on his part of the surface of the unit—the entire power of the Commission to designate a suitable operator would be aborted. For the Commission's power would be subject to the veto or acquiesence of the owner of the tract on which the well-site was designated, or the Commission would be obliged to designate a new site which would result in uneconomic production from the common source of supply.

Our thesis here, as to the legal effect of pooling regulation, is the only basis on which it logically can be sustained. But, if the theory advanced by Appellees should be adopted to support the entirely radical extension of police power of compelling an interest-owner in a unit to become a mining co-partner of a co-owner, or to forfeit his rights in the production from a predetermined "common source of supply", then the elementary foundation for sustaining the legality of pooling regulation must be discarded, and pooling regulation rendered logically invalid in favor of the new objective—"encouragement of development."

Appellees, and the author of the Oklahoma court opinion, dwell upon what they consider the inequity of permitting a co-tenant in a unit to "sit back" and let another develop the unit, carrying the entire risk of the loss of money the latter expends. Such a consideration involves

the application of fundamental concepts of the science of justice—of established principles which constitute "due process of law."

The conflict of correlative rights and obligations of joint owners of property—particularly of co-tenants—has resulted in the development of the long-established rule of law that essential justice is dispensed by allowing a co-tenant to develop the jointly-owned property at his will but granting to him a lien upon the rents and profits he produces for a non-participating co-tenant until he is repaid for his expenditure. Such a solution of the possible conflict of rights is provided by the very statute here under consideration; and such a solution does no violence to the vested property rights of either co-tenant.

As was said by the Oklahoma Supreme Court itself in the case of *Application of Peppers Refining Co.*, 272 P.2d 416, 424:

> "In our opinion it is more important to secure to each lessor, lessee, and owner of mineral rights in a field, his ratable share of the production therefrom and to prevent underground waste, than it is to secure to some the maximum profits from drilling and producing operations."

The only reasoning by which the judgment of the lower court, in this case, can be rationalized is by a complete departure from that traditionally and firmly established tenet of property rights, by the abandonment of "due process of law" in favor of a "*new* process of law."

Our contentions *in seeking review* are not predicated upon the proposition that the statute here involved actually contains no language to give warrant for this unprecedented

extension of the police power into fields remote from and inimical to restricting mineral production. Nor is capital sought to be made of the fact that this new legislation actually dates from the rendition of the judgment of the Oklahoma court in this case, since the *Superior Oil Company* case, *supra*, had recognized a relationship of cotenancy to exist between the unit interest-owners under the statute *as then construed by the Court.*

It is recognized that a party has no vested right in a judicial decision, or any right of constitutional complaint at a change of judicial viewpoint, even when it results in the practical amendment of a State statute.

But, from the standpoint of review in this Court of the validity of legislation heretofore sustained as a legitimate exercise of the police power in implementation of *conservation,* when the objective of the police power is changed to that of *"encouragement of development"*, and the governmental action is of a nature wholly unrelated to restriction of production, rendering the reasoning of all prior decisions rationally inapplicable, the new and vitally substantial Federal questions thereby presented are of a nature entirely worthy of plenary consideration on their own merits.

The Federal questions we seek to present to the Court in this appeal generically are threefold (although subdivided in their presentation in the Jurisdictional Statement): *First*, that the police power—although *virtually* all-encompassing—still cannot justify a governmental attempt to deprive a person of his liberty to refrain from contracting (a) to become a partner in another's specula-

tive enterprise or (b) to lease to another a valuable property right; *Second*, that the police power—although *virtually* all-powerful—cannot justify a governmental attempt (a) to take $55,000.00 of a person's money to aid in another's speculation or (b) to take from him a valuable property right for another's private use, regardless of the compensation; and *Third*, that the objective of "encouragement of development", as distinguished from restriction of production in the interest of "conservation", is supported by no reasonable or legitimate public purpose of an urgency which would justify such a violation of traditional personal and property rights.

Whether or not this Court ultimately should resolve those questions in the affirmative, they hardly could be dismissed as unsubstantial in view of the many decisions of this Court on the merits of similar presentations of like challenges to other legislation.

II.

The Asserted Non-Federal Basis of the Judgment

The arguments of Appellees on this ground of their Motion to Dismiss are not quite clear. They appear to be predicated on the theory that our complaint is to the *action* of the Corporation Commission rather than to the *statute* itself. For, emphasis is made on the wording of the statute which empowers the Commission to require pooling "upon such terms and conditions as are just and reasonable", etc.

However, counsel for the Appellees appear to have overlooked, or to have studiously ignored the statement made on page four, and the parenthetically emphasized premise to the statement of the "Questions Presented by the Appeal" (on page 6) of our Jurisdictional Statement.

We well might have attacked the Commission's alternative order as unjust and unreasonable. In that event, there would have been drawn in issue the validity of the *actions* of the Commission as *unauthorized* by the statute.

But the Supreme Court of Oklahoma, in its judgment as declared by the first syllabus of the opinion (Appendix A, page i, Jurisdictional Statement) held that *the statute authorized* the precise order made by the Commission in this proceeding. Hence, the validity, under the Federal Constitution, of the *actions* of the Commission were relegated to a position of secondary importance by the State court's construction of the *scope of the statute itself*. And, in so doing, the State court, in its second syllabus, recognized the transcendency of the Federal questions inherent in its decision.

CONCLUSION

Believing that further repetition of the matters treated in the Jurisdictional Statement would serve no useful purpose of the Court, it is respectfully urged that the Motion

to Dismiss be denied and that probable jurisdiction be noted to enable more detailed presentation of the Federal questions herein.

Respectfuily submitted,

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